No. 08-863

IN THE

Supreme Court of the United States

ROBERT FAIRLEY, PETITIONER

v.

THE STATE OF LOUISIANA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT FAIRLEY
pro se

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QUESTIONS PRESENTED

1) Whether the Petitioner's civil rights claims pursuant to 42 U.S.C. §1983 were erroneously dismissed "on the pleadings" pursuant to Rule 12 without the Lower Courts seriously considering whether the State of Louisiana, its agency and instrumentality and individual department head waived immunity from being required to litigate claims brought against them in Federal Court pursuant to the 11th Amendment to the U.S. Constitution, including particularly, but without limitation, waiver "by litigating conduct" in the Federal forum by voluntarily invoking the jurisdiction of the United States District Court for the Eastern District of Louisiana on multiple occasions since Hurricane KATRINA occurred on August 29, 2005? See: Gil Seinfeld, "Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question", 63 Ohio State Law Journal 871 (2002).

2) If waiver of 11th Amendment immunity occurred, whether the State of Louisiana, the Louisiana Department of Public Safety and Corrections, and Secretary Stalder, sued in an official capacity, were "persons" under 42 U.S.C. §1983?

3) Whether Petitioner should have been given the opportunity to discover whether the State's 11th Amendment immunity was abrogated by Congress, or waived by the State, et al., by virtue of "strings" attached to the BILLIONS in Federal monies which have flowed into the State coffers, both before and since Hurricane KATRINA?

4) Whether Petitioner'S claims against Secretary Stalder, individually, should not have been dismissed on the basis of qualified immunity, which was an affirmative defense which was not proven "on-the-papers", and to the contrary demonstrated blatant violation of clearly established constitutional rights, and sins of commission and omission, none of which were "objectively reasonable"?

5) Whether the Lower Courts improvidently dismissed Petitioner'S claims for prospective injunctive relief?

6) Whether the Lower Courts abused their discretion by failed to exercise supplemental jurisdiction over Petitioner's State law claims?

PARTIES TO THE PROCEEDING

PETITIONER: Robert Fairley[1]

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[1] The following individuals, whose procedural and substantive rights will be affected by this appeal.

Karen A. Collins, Lynette Renee Cambridge, Ebony Ellis, Donette Atkinson, Lisa Mzones or Myones, Shawnee Duncan, Barbara Sanders, Patricia Wells, Belinda Wilson, Barbara Ann Anderson Michelle Sandifer, Courtney Conway, Gilda Washington, Ebony G. Ellis, Tyrone Cuneo, Sheila Cuneo, Cherie Johnson, Calvin Preyan, Larry Lawrence, Kevin Davis, Joseph Jones, George Lewis, Rudell Griffin, Thadeus Baxter, Willie Gibson, Tony Lemon, Jason Lemon, John D. Lynch, Ronald George, Michael Whitfield, Larry E. Warner, Calvin Preyan, Larry Lawrence, Kevin Davis, Joseph Jones, George Lewis, Rudell Griffin, Whitfield, Wallace M. Barnes, Joe Dorsey, Willie Gibson, Geghvar Hooks, Edwin B. Bates, Gregory Lewis Henry, Jefferson Eric Yarborough, Michael Ricks, Frederick Lewis, Derrek B. Givens, Leonard Roundtree, Sean Morice Wesley, Kilven Green, Larry Howard, Gary Michael Williams, Dermaine Jeffery Wallace, Tyrone Smith, John Tate, Angelo Collins, Darrel Salvage, Larry E. Warner, Carolyn Williams, Stephen Watson, Michael Bourgeois, Dermaine Jeffrey Wallace, Wesley Keith Nelson, Letetia Nelson, Leroy Walker, Jr., Ashley Escuve, Frank Teapo, Ms. Letetia Nelson, John Caston, Ronald Delaney, Lawrence Biddle , Brian Cockerham, Edmond Gabriel, Clifford Harris, Michael Washington, Thaddeus Jenkins, John Gustave, Larry E. Warner, Reginald Lindsey, Dermaine Wallace, Malcolm Johnson, Elviria Morgan, Gwendolyn J. Green, Leonard G. Roundtree, Kenyon Fields, Joseph Smooth, Emile McCrory, Clinton Givens, Lloyd L. Johnson, Tiffany T.S. Johnson, Christine Smith, Andrea Woods, Jeffrey Brown, Christopher Dukes, Kenneth Broussard, Cornell Morris, Felicia Morris, Malik Barbrie, Makai Barbrie, Wayne Anderson, Milton Davis, Kevin R. Walker, Kevin Martin, John Tate, Paul Walker, Paul Lawrence Walker, Tyrone Johnson, Malcolm Henry, Reynard Joseph Johnson, Gregory Henry, Damian Lee, Derrick Jarrow, Sean Wesley, Frankie Bernard, Donnie Floyd, Terrell Smothers, Sheldon Morgan, Glenn R. Frank, Emanuel Randall, Darrell White, Sr., James Mayo, Alfred Westley, Kevin Love, Glenn Frank, Hyran Brooks, Jr., Jamal Brooks, Roy A. Johnson, Jr., Samuel Coleman, Richard Smith, Junius

RESPONDENTS: The State of Louisiana, The Louisiana

Jones, Jessie Bowie, Garland Faciane, David M. Wells, Nolan Alexis, Jr., Tom Thomas, Shelita M. Culler, Quinn Ellis Tabb, Nolan Alexis, Jr., Walter Johnson, Angelo Collins, Inell Brown, Henry Styles, Dan Lee, Willie E. James, Gerard A. Lawless, Louis Wright, Vincent Joseph Harris, Nolan, Anthony Blazio, Darrill Henry, Terrance Noel, Curt L. Northrop, Christopher Stemley, Paul Washington, Jr., Madeline Johnson, Tyrone Collins, David Horton, Vincent Harris, Toni Harris, Antonio Monroe, Louis J. Wright, Darrell V. Edwards, Eric Naquin, Rand Alexander, Louis J. Wight, Darrell D. Edwards, Reynard J. Johnson, Kevin Jones, Mervin Moore, Catherine Straughter, Deatrol Birtha, Charles Steadman, Lester C. Jackson, Darcey Miller, Ronald G. Register, Kevin Morgan, Kevin Jones, Kevin Earin, David Salomon, Benny Inches, Derrick Diggs, Tyrone Johnson, Wanda Smith, Carlton Bennett, Sean Wesley, Kevin Brooks, Donnie Floyd, Terrance Noel, Shalita Howard, Byran Brooks, Jr., Jamal Brooks, Christopher Dukes, Elveria Morgan, Calvin Preyan, Sean Maurice Wesley, Kilven Green, Ronald Anderson, Tyrone Wilson, Malcolm Henry, Michelle Quinn, Edmond Gabriel, Dawn Caston, Janice Alexander, Judith Tolliver, Brian Allen Joseph, Chad Phillips, Terrence Kennedy, Kevin Wilkes, Kerry Wheeler, Anthony David Simon, Sr., Matthew Wilson, Amanda Washington, Willie James Brock, Lacrechia C. Warner, Willie Lemon, Bobby Charles, Kenneth Tyler, Spencer Dawson, Thomas Porter, Jr., Wilbert White, George Landry, Lawrence Byrd, Eric S. Gardner, Kirkland Brown, Joseph W. Jones, Michael Keenan, Julius A. Benjamin, Renaldo Carter, Darren Williams, Henry Faggin, Raymond Karl Emilien, Thomas Porter, Jr., Percy Allen, Harry Hills, Steven Craig Lawson, Steven Ray Haywood, Randy Holmes, Walter K. Richardson, Edward Joseph Stevenson, Kirkland C. Brown, Derrick Draughter, Rodney J. Lee, Steven Haywood, William Earl Johnson, Darryle L. Johnson, Henry Edward Erings, Nekisha Harvey, Charles Stevenson, Paul Walker, Dion Joseph Richard, Darryl Harrell, Samuel J. Coleman, Jr., Jimmie Ross, James McClain, David Keith Cook, Jr., Nathan St. Brice, Patrick Clark, John Johnson, Jr., Aaron Ford, Brian Grayer, Tommy Lee Bolden, Darnell Reese, Kenneth Williams, Donald Jackson, Joe Louis Barnes, Joseph Fletcher, Kenneth Richardson, Kantrell Harrell, Nathaniel Bolden, Rickey Liner Williams, Michelle Marie Price, Dwight Singleton, and Alvin Madison

Department of Public Safety and Corrections, Richard L. Stalder, Secretary, Department of Public Safety and Corrections, The Orleans Parish Criminal Sheriff's Office Orleans Parish Criminal Sheriff Marlin Gusman, Deputies, Officers and/or Troopers Joe Doe and Richard Roe, Ronald George, Ladoia Smith, Tyrell LeBlanc, Clifton Thompson, Nathanial Carr, Kevin Green, Fay Hardy

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OPINIONS BELOW

The opinion of the United States court of Appeals for the Fifth Circuit is reported 1a. The opinion of the United States District Court for the Eastern District of Louisiana is reported at 24a.

JURISDICTION

The District Court issued separate Orders and Reasons on March 23 and 27, 2007, and the Rule 54(b) Partial Final Judgment entered on May 24, 2007. A timely Notice of Appeal followed. The decision of the Court of Appeals was issued on August 6, 2008. This Petition is filed within 90 days thereafter. This Court has jurisdiction pursuant to 28 U.S.C. §1254(a).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

United States Constitution, Amendment XIV, Section I

> 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. §1367, Supplemental Jurisdiction

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

42 U.S.C. §1983, Civil Rights Act

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any person within the jurisdiction thereof to other deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Art. 2315. Liability for acts causing damages

> A. Every act whatever of man that causes damage to another obliges him to whose fault it happened to repair it.

STATEMENT

This is a class action for damages stemming from the deprivation of and violation of the constitutional rights of hundreds of prisoners who were incarcerated in various Orleans Parish penal facilities prior to and after Hurricane KATRINA. Although currently Petitioner has little doubt that the Members of This Honorable Court cannot erase from their memories the horrific images of poor, unfortunate "Victims of KATRINA", who were stranded, for days, on rooftops, on bridges, on elevated roadways, and at the Superdome, the Convention Center and other places of refuge following the storm, precious little has been publicized about the plight of the helpless inmates, both male and female, of the Orleans Parish penal facilities.

Both groups of people, the free and the incarcerated, were innocent victims of gross incompetence and malfeasance at all levels of government.[1] However, in many ways, what happened to Petitioner in this litigation was much worse than what happened to the free Victims of KATRINA, because Petitioner had absolutely no control over his own plight and was wholly dependent on others, including particularly the defendants in this litigation, for their health, safety and well-being, not to mention the constitutional guarantees to which they were (and are) entitled.

Petitioner originally pleaded his case as follows:

COMPLAINT FOR COMPENSATORY AND EXEMPLARY DAMAGES IN A CLASS ACTION LAWSUIT AND DEMAND FOR TRIAL BY JURY

1. This is an action for civil damages, including both compensatory and exemplary damages, prejudgment interest and taxable costs, and for reasonable attorney's fees.

2. Named plaintiffs in this action are Robert Fairley and Ronald George, competent persons of the full age of majority who, at all material times, were and now are citizens of the State of Louisiana and domiciliaries of the City of New Orleans. Plaintiffs reserve the right to amend the list of named plaintiffs, as more persons

[1] The "common thread" which this case has with all "Victims of KATRINA" litigation is that the great bulk of the misery suffered by Petitioner herein would not have been suffered if the levees had not breached.

representative of the class of plaintiffs described, infra, join this litigation and express the desire to be represented by undersigned counsel.

3. Plaintiffs are representative of the following classes of people, inter alia:

> Inmates and/or former inmates of various penal facilities within the Parish of Orleans, State of Louisiana prior to and in the aftermath of Hurricane KATRINA, which struck the City of New Orleans on the morning of August 29, 2005, including inmates and/or former inmates of those penal facilities operated and maintained by the Orleans Parish Criminal Sheriff's Office and referred to as "Orleans Parish Prison", "House of Detention", "Templeman 1", Templeman 2", Templeman 3", "Templeman 4", Templeman 5", and "South White Street", and who suffered bodily, physical or personal injury, and who sustained mental suffering and emotional distress, and who suffered loss of personal property, as result of the actions and inaction of the defendants, complained of herein.

4. Putative members of the class of persons on whose behalf this action is brought include the following individuals:

> Kevin Green,
> Ladoia Smith,
> Charles Sykes,
> David Taylor, and

Christopher Taylor,

who remain incarcerated under the supervision of The Louisiana Department of Public Safety and Corrections and/or The Orleans Parish Criminal Sheriff's Office, but who have not yet exhausted the administrative remedies provided them pursuant to the provisions of the Prison Litigation Reform Act. Plaintiffs Robert Fairley and Ronald George, having been released from incarceration prior to the institution of this litigation, are not required to exhaust administrative remedies as a pre-requisite to filing suit.

5. Made defendants herein are the following:

1. The State of Louisiana;
2. The Louisiana Department of Public Safety and Corrections;
3. Richard L. Stalder, who is sued both individually and in his capacity as Secretary, Department of Public Safety and Corrections;
4. The Orleans Parish Criminal Sheriff's Office;
5. Marlin Gusman, who is sued both individually and in his capacity as Criminal Sheriff for Orleans Parish;
6. Deputies, Officers and/or Troopers John Doe and Richard Roe[2]

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[2] Whose true identities are presently unknown to plaintiffs, who reserve the right to substitute the proper names, once their identities become known.

6. Defendants, The State of Louisiana and The Louisiana Department of Public Safety and Corrections, have directly or indirectly, through other agencies of State Government, invoked the jurisdiction of This Honorable Court and/or otherwise waived immunity to suits against them in federal court otherwise available under the 11th Amendment to the U.S. Constitution, which plaintiffs aver is not applicable to suits of this nature by citizens of a defendant state against their own state.

7. This Court has jurisdiction of the claims asserted herein pursuant to the provisions of 28 U.S.C. §1333 and 28 U.S.C. §1343. This Court has jurisdiction of the State law claims asserted herein pursuant to the provisions of 28 U.S.C. §1367.

8. At approximately 1800 hours on Friday, August 26, 2005, Governor Kathleen Blanco declared a State of Emergency as the projected track of Category 5 Hurricane KATRINA threatened Southeast Louisiana. At that same time, plaintiff Robert Fairley was an inmate at Templeman 1 and plaintiff Ronald George was an inmate at Templeman 2, penal facilities which were owned and/or operated by the City of New Orleans and by the Orleans Parish Sheriff's Office, respectively. At approximately 0930 hours on Sunday, August 28, 2006, Mayor C. Ray Nagin ordered the first-ever evacuation of the City of New Orleans. Notwithstanding the State of Emergency declared by the Governor and the Mayor's so-called "Mandatory Evacuation

Order", no evacuation plan was ever implemented by any of the defendants to evacuate plaintiffs from the facilities in which they were incarcerated prior to Hurricane KATRINA's making landfall in Louisiana, no action was taken by defendants to move plaintiffs to elevations above the flood-plain, and no provision was made by defendants to stockpile the referenced penal facilities with food, water, clothing, bedding, sanitary facilities or medication.

9. Commencing some time after 0930 hours on Sunday, August 28, 2006, as Hurricane KATRINA bore down on the Greater New Orleans Metropolitan Area, defendants, who were charged by law with safeguarding plaintiffs' health, safety and welfare, simply abandoned plaintiffs to their fate, the result being that for several days after Hurricane KATRINA made landfall in Louisiana early on Monday morning, August 29 2005, plaintiffs and other similarly situated to plaintiffs remained under "lock and key", in fetid[3] conditions, without food, water or sanitary facilities, and without any information about what had happened in the City as the storm passed, and when plaintiffs could expect any assistance. When help did arrive, some days later, plaintiffs were exposed to and immersed in the "toxic soup" which inundated New Orleans, and then transported to an overpass, where they

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[3] Due to contaminated flood water, and/or sinks, drains and commodes backing up into plaintiffs' living spaces.

remained for several hours, baking in the hot sun in a filthy and extremely uncomfortable condition prior to ultimate evacuation from the City to State operated penal facilities.

10. Prior to, during, and after Hurricane KATRINA, the defendants named herein, or each of them, acting under color of state law, ordinance, proclamation, regulation, statute or usage, in an official capacity, and in furtherance of unlawful and unconstitutional custom, practice and policies, in violation of federal and state law, and intentionally and with deliberate indifference, committed the following constitutional torts against plaintiffs and against those similarly situated to plaintiffs:

Abandonment
Assault and battery, including using excessive force under the facts and circumstances

Failure to have Emergency Operations Plans

Failure to follow the plans, if such plans existed.

Infliction of physical injury.
Intentional and/or negligent infliction of cruel and inhumane punishment.

Intentional and/or negligent infliction of mental anguish and emotional distress.

> Intentional and/or negligent failure to provision food, water, clean clothes and bedding, sanitary facilities and medications.

11. By virtue of defendants having committed the above described constitutional torts case against plaintiffs, all named defendants violated rights, privileges and immunities guaranteed to plaintiffs under the 4th,[4] 8th and 14th Amendments of the United States Constitution, all in violation of 42 U.S.C. 1983.

12. Defendants' actions and inactions were practiced intentionally, with malice, and/or with reckless disregard for and/or with deliberate indifference to plaintiffs' federally protected rights, as well as plaintiffs' rights under State law.

13. As a direct result of the above-described tortuous, unconstitutional and illegal conduct of defendants, plaintiffs aver entitlement to monetary damages from defendants, including compensatory and exemplary damages, and damages for the following:

> Attorney's fees directly and reasonably incurred in proving actual violations of plaintiffs' rights under the Prison Litigation Reform Act.

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[4] This is a typographic error. Petitioner avers the violation of his Constitutional rights under the 5th Amendment to the U.S. Constitution.

Deprivation of property.

Physical injury.

Pain and suffering.

Mental anguish and emotional distress, including anxiety, depression, fear, helplessness and hopelessness.

14. Plaintiffs aver that the actions and inaction by the public entities named as defendants and by their officers, complained of herein, were willful, and constituted criminal, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct, so as to deprive those entities and officers of immunity from liability pursuant to the provisions of LSA-R.S. 9:2798.1, and, additionally aver that those entities and officers were in derogation of and violated specific rules and regulations promulgated pursuant to the provisions of LSA-R.S. 29.735, so as to deprive those entities and officers of immunity from liability under the provisions of that statute as well.

15. More to the point, plaintiffs aver that defendants had no discretion to violate the law and to deprive plaintiffs of their constitutional rights.

16. Plaintiffs aver that any State law, ordinance, proclamation, regulation, statute, etc., pursuant to which defendants, or any of them, claim they acted, is unconstitutional, and that

defendants' conduct pursuant to any State law, ordinance, proclamation, regulation, statute, etc., cannot be immunized by State law.

17. Plaintiffs demand trial by jury of all issues so triable as to every party. As to parties to which trial by jury may not be available, plaintiffs request an advisory jury pursuant to the provisions of Rule 39(e), FRCP, or any other applicable rule.

WHEREFORE, plaintiffs pray that their class status be recognized and certified as such, and that after trial on the merits, and all due proceedings had, there be judgment entered in favor of plaintiffs and against defendants, jointly, severally and in solido, for the amount(s) of plaintiffs' damages, both compensatory and exemplary, plus reasonable attorney's fees, pre-judgment interest and costs, and for all other equitable relief.

Thereafter, Petitioner amended his Complaint by First Supplemental and Amending Complaint, which added a number of additional plaintiffs.

In a Court-Ordered Second Supplemental and Amending Complaint, Petitioner pleaded as follows:

COURT-ORDERED SECOND SUPPLEMENTAL AND AMENDING COMPLAINT

COME NOW plaintiffs, appearing through undersigned counsel, and supplement

and amend their Complaint, as already supplemented and amended, as follows:

I.

By amending the jurisdictional allegations originally pleaded in Article 6 and 7 by adding the following paragraph:

> More particularly, plaintiffs aver that jurisdiction over the claims asserted against the State of Louisiana, the Louisiana Department of Public Safety and Corrections, Richard L. Stalder in his official capacity as Secretary, Department of Public Safety and Corrections, exists because plaintiffs do hereby amend their Complaint in order to state a claim against the said defendants, and others, for prospective injunctive relief, which plaintiffs in this class action aver they are entitled to pursuant to the provisions of Rule 23(b)(2), and pursuant to the provisions of Rule 65, Federal Rules of Civil Procedure, so that the said defendants are amenable to suit in Federal Court with respect to the requested prospective injunctive relief, regardless of the Eleventh Amendment to the U.S. Constitution, and regardless of whether the said defendants are "persons" under 42 U.S.C. §1983.
>
> Further, plaintiffs aver that Eleventh Amendment immunity is not available to the said defendants, because this Court has, and has always had, jurisdiction over plaintiffs' claims against the said defendants pursuant to Article III, Section II of the U.S.

Constitution, and by virtue of the fact that the State of Louisiana, agencies instrumentalities of the State, and heads of those agencies, in their official capacities, have waived sovereign immunity by virtue of Article XII, Section X(A) of the Louisiana Constitution of 1974 and by virtue of LSA-R.S. 9:2798.1.

Further, plaintiffs aver that the matters which they are seeking to litigate are matters on which Congress has already abrogated the State's Eleventh Amendment immunity, in the areas of "flood control", "hurricane protection", "prison reform", and "disaster preparation and response".

Further, plaintiffs aver, upon information and belief, that the State, their agencies and their heads, in their official capacities, have waived Eleventh Amendment immunity by virtue of receipt of Federal monies and by virtue of express waivers of Eleventh Amendment immunity executed in consideration of receipt of Federal monies, both before and since Hurricanes KATRINA and RITA.

II.

By amending their liability allegations against the State defendants by pleading the contents of the attached American Civil Liberties Union, National Prison Project Report entitled: "Abandoned & Abused; Orleans Parish

Prisoners in the Wake of Hurricane Katrina", which is available at www.ACLU.org.[5]

III.

By averring that plaintiffs are entitled to the full report commissioned by the State of Louisiana.[6]

IV.

By pleading entitlement to the following prospective injunctive relief:

> That all defendants be ordered and required to do the following:
>
> 1. Design and implement a coordinated emergency plan to ensure that all prisons and jails are capable of quickly and safely evacuating before the next disaster strikes.

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[5] Petitioner and others "wonder" why the contents of this most "shocking" report have not gotten more publicity from the "National Media". Petitioner avers that the contents of this report are a "black mark", not only on the State of Louisiana, Secretary Stalder and Sheriff Gusman, but on the entire human race. See *infra*.

[6] The full report which was commissioned by the State of Louisiana, and more particularly by Secretary Stalder of the Louisiana Department of Public Safety and Corrections, is now available at http://.abanet.org/crimjust/katrinanicreport.pdf, its nomenclature being: "The National Institute of Corrections Technical Assistance Report No. 06P1035", entitled: Hurricanes KATRINA and RITA and the Louisiana Depart. Of Public Safety and Corrections: A Chronicle and Critical Incident Review, by Jeffrey A Schwartz and David Webb, dated May 10, 2006. See *infra*.

2. Downsize the jail by ending the practice of holding state and federal prisoners.

3. Implement reforms to decrease the number of pre-trial detainees held at OPP.

4. Convene a Blue Ribbon Commission to develop and implement a full set of recommendations for detention reform.

5. Reduce the use of juvenile detention by exploring viable alternatives to detention.

6. Begin to view detention as a process rather than a place.

7. Appoint an Independent Monitor.

8. Work with officials at the State, local and federal levels to implement a coordinated emergency response plan that works across departmental boundaries.

9. Conduct regular audits of local jails holding state prisoners.

10. Commence an investigation into the treatment of prisoners at OPP and at various receiving facilities, to discover whether human and civil rights violations occurred.

The relief requested was recommended to the State and local defendants herein by the

American Civil Liberties Union in the referenced report, pages 10 and 11.

V.

By averring that plaintiffs are entitled to a full report of the National Institute of Corrections, to the State of Louisiana and its agencies and instrumentalities, namely "Technical Assistance Report" (TA No. 06P1035).[7]

VI.

Plaintiffs reaver and reiterate all of the allegations of their original Complaint as supplemented and amended, as if copied herein *in extenso.*

WHEREFORE, plaintiffs pray that their Complaint, as supplemented and amended, be further supplemented and amended as pleaded herein, and that their class status be recognized and certified as such, and that after trial on the merits, and all due proceedings had, that there be judgment entered herein in favor of plaintiffs and against defendants, jointly, severally and *in solido,* for the full amount(s) of plaintiffs' damages, both compensatory and exemplary, plus reasonable attorney's fees, pre-judgment interest and costs, and for the prospective injunctive relief prayed for herein.

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[7] *Ibid.*

A motion for leave to amend the Complaint for the third time in order to add additional plaintiffs was denied. (Record Document No. 50).

The facts which underlie Petitioner's pleadings in the District Court are found in the ACLU Report which is available at http://www.ACLU.org/prison/conditions/26198res20060809.html and in the National Institute of Corrections Technical Assistance Report which is found at http://www.abanet.org/crimjust/Katrinanicreport.pdf. The ACLU Report clearly reflects that "At the time of the storm, OPP housed nearly 2,000 State prisoners.", for which Orleans Criminal Sheriff Marlin Gusman was receiving a "healthy" daily stipend from the State of Louisiana. ACLU Report, p. 14. In the words of the ACLU, "The state has a responsibility to ensure that its prisoners who are in OPP and other local jails are provided with the minimal necessities required under state and federal law." ACLU Report, p. 11. In the words of the ACLU:

> "The state's power to imprison its citizens carries with it the duty to provide for their basic needs. The Eighth Amendment of the U.S. Constitution, which prohibits the infliction of cruel and unusual punishment, protects prisoners from the deprivation of food, clothing, shelter, medical care, and reasonable safety. The Eighth Amendment is violated when the state shows 'deliberate indifference' to conditions that pose a substantial risk of serious harm to prisoners." ACLU Report, p. 17.

No less authority for the foregoing is the United States Supreme Court in: DeShaney v. Winnebago County Department of Social Services, 489 U.S. (1989); Farmer v. Brennan, 511 U.S. 825 (1994); and Youngberg v. Romeo, 457 U.S. 307 (1982).

Among the many deprivations suffered by Petitioner in this case, and specifically addressed in the ACLU Report, were the following:

> Abandoned by the Sheriff and the State of Louisiana, pages 32-33
> Trapped in "lockdown" as flood waters rise, page 35
> No food or water, page 39
> Denial of medical care, page 39, et seq.
> Subjected to violence from other prisoners, page 45, 47
> Immersed in the toxic soup, page 61
> Left on overpass awaiting evacuation, pages 65-66

Petitioner respectfully submits that the deprivations suffered constituted more than violation of his constitutional rights, namely his right to human dignity, which was denied them by his "keepers", both State and Local.

The most serious charges by Petitioner, namely "abandonment", and failure to have emergency operations plans, or to follow the plans, if such plans existed,[8] have been specifically addressed by Secretary Stalder and the Louisiana Department of Public Safety

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[8] Complaint, Article 10, supra.

and Corrections in a report which Secretary Stalder commissioned with the National Institute of Corrections to evaluate the Department's "pre" and "post" KATRINA planning and response. See ACLU Report, p. 10. When the ACLU Report was published in August 2006, Secretary Stalder and the Department of Public Safety and Corrections, had refused to release that report ("the NIC Technical Assistance Report") to the public. ACLU Report, p. 10. However, the "Executive Summary" of the NIC Technical Assistance Report to the Louisiana Department of Public Safety and Corrections was attached to the ACLU Report (pages 119-122), revealing the following glaring deficiencies:

> ". . . the Department's planning and preparations for emergency situations was not strong . . ."
>
> * * *
>
> Communications was almost universally regarded as the most dysfunctional aspect of the Department's response.
>
> * * *
>
> The Department does not have a comprehensive emergency system. Some parts of such a system are in place but other parts are missing and there are elements of emergency preparation that do not complement one another. That general assessment holds true whether one looks at Departmental level emergency readiness or one looks at individual institutions. The Department does not use any emergency organizational structure and claim of command that operate on a day-to-day basis. Prior to the hurricanes, LA DPS&C had not provided enough training on emergency preparedness to its staff,

> and the training that Hurricanes Katrina and Rita had been provided (sic) was too superficial and not particularly effective.

NIC Technical Assistance Report "Executive Summary", ACLU Report at pp. 121-122.

The complete NIC Technical Assistant Report to Secretary Stalder and the Louisiana Department of Public Safety and Corrections is now available at http://www.abanet.org/crimjust/Katrinanicreport.pdf or at "National Institute of Corrections Technical Assistance Report TA No. 06p1035", and contains "exquisite detail" concerning the deficiencies previously identified in the NIC Report Executive Summary, attached to the ACLU Report. Perhaps most "telling" is the following from page 18 of the complete NIC Report:

> The situation inside the jail was very bad. Inmates on first floors had been in rising badly polluted flood waters until they were moved to higher floors. The fuel tanks for the emergency generators were in the basement so that when the floodwaters first reached the jail complex, the main power and the emergency power both went off. That meant no lights and no running water, no operable toilets, etc. Additionally, the buildings did not have opening windows and were dependent on the HVAC system for fresh air. With no power and no emergency power, the HVAC system was inoperable.
>
> There is a great deal of controversy about how bad conditions were within OPP from Monday,

> when Katrina hit, until Thursday, when the evacuation was complete. The questions of conditions within OPP and what the OPP staff did or didn't do are outside the scope of the consultants' charter and this report has no light to shed on those questions.
>
> Not withstanding that controversy, there is no question but that some of the OPP population was frightened or terrified, and that some prisoners were desperate and angry.

Secretary Stalder's incompetence in the area of Disaster Preparation and Response, which forms the basis for plaintiffs'/appellants' causes of action against him and the Department, appears at pages 78-83 of the NIC Technical Assistance Report, and may be summarized as follows:

> He failed to have a comprehensive emergency system
> He failed to have an emergency organizational as structure
> His existing emergency plans were inadequate and outdated
> His existing plans lacked continuity from institution to institution
> His existing plans lacked depth
> He failed to properly train his department's employees in emergency preparation and response
>
> He failed to establish a reliable communications network and the chain of command structure during the emergency.

In short, Secretary Stalder's personal incompetence is well-documented in the National Institute of Corrections Technical Assistance Report.

In keeping with the defense posture of all defendants in "Victims of KATRINA" litigation, which is essentially: "No one is legally responsible to anyone for anything", Rule 12 motions to dismiss were filed by all of the State defendants. In Record Document No. 24, filed on November 13, 2006, Petitioner outlined in a Memorandum in Opposition to Motions to Dismiss the following issues, which were preserved for appeal purposes:

> The arguments advanced by Petitioner in opposition to the State defendants' motions to dismiss were:
>
> 1. Plaintiffs should be allowed to amend their Complaint, to assert a claim for prospective injunctive relief.
>
> 2. The State of Louisiana and its agency waived 11th Amendment immunity.
>
> 3. Alternatively, the State defendants' Motions should be denied, because the matters which plaintiffs were seeking to litigate were matters on which Congress has already abrogated the State's 11th Amendment immunity, involving Flood Control, Hurricane Protection, Prison Reform and Disaster Preparation and Response, and plaintiffs should be

permitted to conduct discovery concerning the Federal, State and local legislative schemes, which have established "partnerships" between and among the Federal, State and local governments.

4. The 11th Amendment has been badly misconstrued by the judiciary, and does not apply under the facts and circumstances of this case.

5. Secretary Stalder enjoyed no immunity from suit in his individual capacity.

6. Plaintiffs specifically averred conduct by Secretary Stalder individually, which fell outside of any state statutory scheme for immunity or "qualified immunity" from suit.

REASONS FOR GRANTING THE PETITION

I. THE STATE OF LOUISIANA, ITS AGENCIES AND INSTRUMENTALITIES, AND INDIVIDUAL DEPARTMENT HEADS, HAVE WAIVED 11TH AMENDMENT IMMUNITY BY THEIR LITIGATING CONDUCT SINCE HURRICANE KATRINA.

The facts giving rise to this litigation were extensively investigated and reported on in exquisite detail in two very detailed reports which are now public:

1) Comprehensive report authored by the National Prison Project of the American Civil Liberties Union, entitled: "Abandoned & Abused: Orleans Parish Prisoners in the Wake of Hurricane KATRINA", in August 2006, and available @ http://www.ACLU.org/prison/conditions/26198res20060809.html. The contents of that report were specifically pleaded by plaintiffs in their Court-Ordered Second Supplemental and Amending Complaint (Record Document No. 32).

2) The National Institute of Corrections Technical Assistant Report No. 06P1035 entitled: Hurricanes KATRINA and RITA and the Louisiana Dept. of Public Safety and Corrections: A Chronicle and Critical Incident Review", authored by

Jeffrey AS. Schwartz and David Webb on May 10, 2006.

The first "Question Presented" to This Honorable Court is:

1. Whether the Petitioner's civil rights claims pursuant to 42 U.S.C. §1983 were erroneously dismissed "on the pleadings" pursuant to Rule 12 without the Lower Courts seriously considering whether the State of Louisiana, its agency and instrumentality and individual department head waived immunity from being required to litigate claims brought against them in Federal Court pursuant to the 11th Amendment to the U.S. Constitution, including particularly, but without limitation, waiver "by litigating conduct" in the Federal forum by voluntarily invoking the jurisdiction of the United States District Court for the Eastern District of Louisiana on multiple occasions since Hurricane KATRINA occurred on August 29, 2005? See: Gil Seinfeld, "Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question", 63 Ohio State Law Journal 871 (2002).

This Court is respectfully directed to the following completely voluntary invocations of the jurisdiction of the United States District Court for the Eastern District of Louisiana by the State of Louisiana since Hurricane KATRINA:

Civil Action No. 05-4182

Record Document No. 1061

Civil Action No. 06-8676

Record Document Nos. 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 41, 100, 101. 102, 112, 124, 135, 142, 151, 177 and 180

Civil Action No. 07-5023

Record Document No. 1

Civil Action No. 07-5036

Record Document No. 1

Civil Action No. 07-5040

Record Document No. 1

Civil Action No. 07-5226

Record Document No. 1

Petitioner particularly refers the Court to the claims asserted by the State of Louisiana against the United States of America in Civil Action No. 07-5040, which was filed by the State in the United States District Court for the Eastern District of Louisiana on August 29, 2007, in order to assert an affirmative claim on behalf of the State against the Federal Government in the amount of $200 billion dollars in property

damages allegedly sustained by the State in connection with the levee and retaining wall failures during Hurricane KATRINA.[9]

Petitioner respectfully submit that if waiver by litigating conduct and voluntary invocation of the jurisdiction of the Federal Court system has not occurred with respect to the State of Louisiana in this case, then the Doctrine of Waiver no longer means anything in American jurisprudence.

Petitioner further respectfully refer this Court to the following legal authorities:

> Clark v. Barnard, 108 U.S. 436, 2 S.Ct. 878 (1883)
>
> Ford Motor Company v. Department of Treasury of Indiana, 323 U.S. 459 (1945)
>
> College Savings Bank v. Florida Prepaid Post Secondary Education Expense Book, 527 U.S. 666 (1999)
>
> Lapides v. Board of Regents of the University System of Georgia, 535 U.S. 613, 122 S.Ct. 1640 (2002)

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[9] Petitioner would be remiss if he did not direct the Court's attention to the fact that, if the levees had not failed, then in all probability Petitioner would never have filed suit, thus establishing a causal "connexity", "link" or "nexus" between this case and the litigation voluntarily filed by the State in Federal Court since Hurricane KATRINA.

Fernandez v. PNL Asset Management Company LLC, 123 F.3d 241 (5th Cir. 1997)

Gil Seinfeld, "Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question", 63 Ohio State Law Journal 871 (2002).

Nowak and Rotunda, "Treatise on Constitutional Law – Substance & Procedure", §2.12 (4th Ed.)

Petitioner respectfully submit that even the possibility of waiver of 11th Amendment immunity by a State by virtue of its litigating conduct is an issue which warrants the exercise of this Court's supervisory jurisdiction.

Alternatively, Petitioner respectfully submits that he should have been permitted to conduct discovery into whether the State of Louisiana may have waived 11th Amendment immunity from being required to litigate claims brought against it in Federal Court by virtue of its having accepted untold billions from the Federal Government both before and since Hurricanes KATRINA and RITA. Similarly, Petitioner respectfully submits that he should have been allowed to conduct discovery into whether agencies of the Federal Government, with Congressional authority, may have abrogated the State's 11th Amendment immunity by bestowing untold billions on the State.

II. IF THE STATE WAIVED 11TH AMENDMENT IMMUNITY, THEN THE STATE, ET AL. ARE "PERSONS" UNDER 42 U.S.C. §1983.

Petitioner now addresses a *res nova* issue on which he has been able to locate and obtain only scant authority, namely the relationship between 42 U.S.C. §1983 and the 11th Amendment. That relationship is addressed in Federal Procedure, Lawyers Edition (1989) § 11:249, as follows:

> Because actions under 42 USCS §1983 typically are brought against defendants such as governmental units, governmental officers or employees, or private individuals alleged to have conspired with them, these cases often raise substantive law issues regarding the immunity of particular defendants. The Supreme Court has held that the immunity of the states from damages liability and equitable relief, as guaranteed by the Eleventh Amendment, is not overridden by §1983. A state and state official acting in their official capacities are not "persons" subject to damages liability under 42 USCS §1983.

Petitioner respectfully submits that if 11th Amendment immunity has been waived by the State of Louisiana, then there is nothing for 42 U.S.C. §1983 to "override", and the State, its agency and instrumentality, and Secretary Stalder, sued in an "official" capacity, became suable as "persons" pursuant to 42 U.S.C. §1983.

III. IN NO EVENT WAS SECRETARY STALDER ENTITLED TO DISMISSAL ON THE BASIS OF "QUALIFIED IMMUNITY".

A terrible injustice was done to Petitioner, and to those similarly situated, in the Lower Courts. Petitioner respectfully submits that the rulings of the Lower Courts adverse to Petitioner may have been the result of the Courts' focus being on "who Petitioner is" rather than "what Petitioner suffered". In short, human nature being what it is, Petitioner respectfully submits that "nobody cares" about the accused, or those already adjudicated guilty who are incarcerated to pay their debt(s) to society.

Nevertheless, Petitioner (and those similarly situated) remain optimistic about their ability to get justice in this case in This Honorable Court.

This case arises out of the failure of State and local government, and those who had dominion over the health, safety and welfare of the inmates of the Orleans Parish Prison facilities, to have in place, pre-KATRINA, Emergency Response Plan(s) which included provisions for evacuating Petitioner from the prison facilities to a safe refuge or, failing that, to have in place a plan and the requisite personnel and pre-positioned material assets, including transportation assets, to properly transport, shelter, cloth and feed the inmates, including such rudimentary necessities, like "bread and water". These issues are all addressed *ad nauseum* in both the ACLU/National Prison Project Report, and in the National Institute of Corrections Technical Assistance Report which are identified previously in this Petition.

Secretary Stalder was sued in this case both individually and in his official capacity as Secretary, Department of Public Safety and Corrections Plan. Petitioner respectfully submits that it is "hornbook law" that the 11th Amendment is no bar to damages against State officials who are sued in their individual capacity:

1) Gelfand, Constitutional Litigation Under Section 1983, The Michie Company (1996) §6-2(D).

2) Hafer v. Milo, 112 S.Ct. 358, 502 U.S. 21 (1991). "State Officers sued for damages in their official capacity are not "persons" for purposes of the suit because they assume the identity of the government that employees them. (citation). By contrast, officers sued in their personal capacity come to court as individuals. A government official in the role of personal-capacity defendant thus fits comfortably within the statutory term "person"." 112 S.Ct. at p. 362.

3) Scheuer v. Rhodes, 94 S.Ct. 1963, 416 U.S. 232 (1974) ". . . we see that petitioners allege facts that demonstrate they are seeking to impose individual and personal liability on the named defendants for what they claim – but have not yet established by proof – was a deprivation of federal rights by these defendants under color of State law. Whatever the plaintiffs may or may not be able to establish as to the

> merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil procedure, are not barred by the Eleventh Amendment. Consequently, the District Court erred in dismissing the complaints for lack of jurisdiction." 94 S.Ct. at p. 1687.

Petitioner further respectfully submitd that so-called "qualified" or "good faith" immunity is an affirmative defense which must be pleaded by a defendant official. In the Fifth Circuit, in the fairly recent case of Freeman v. Gore, 483 F.3d 404 (5th Cir. 2007), the Court restated the two-step analysis used in the 5th Circuit to determine whether a defendant is entitled to summary judgment[10] on the basis of qualified immunity:

> This court applies a two-step analysis to determine whether a defendant is entitled to summary judgment on the basis of qualified immunity. First, we determine whether, viewing the summary judgment evidence in the light most favorable to the plaintiff, the defendant violated the plaintiff's constitutional rights. See, e.g., Tarver v. City of Edna, 410 F.3d 745, 750 (5th Circ. 2005); McClendon v. City of Columbia, 305 F.3d 314, 322-23 (5th Cir. 2002) (en banc); Glenn v. City of Tyler, 242 F.3d 307, 312 (5th Cir. 2001). If not, our analysis ends. If

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[10] Recall that this case was summarily dismissed "on the papers" pursuant to Rule 12, prior to any discovery whatsoever, and was not a Rule 56 dismissal.

> so, we next consider whether the defendant's actions were objectively unreasonable in light of clearly established law at the time of the conduct in question. See, e.g., Tarver, 410 F.3d at 750; Glenn, 242 F.3d at 312. To make this determination, the court applies an objective standard based on the viewpoint of a reasonable official in light of the information then available to the defendant and the law that was clearly established at the time of the defendant's actions. See Glenn, 242 F.3d at 312; Goodson v. City of Corpus Christi, 202 F.3d 730, 736 (5th Cir. 2000); see also Tarver, 410 F.3d at 750 ("If officers of reasonable competence could disagree as to whether the plaintiff's rights were violated, the officer's qualified immunity remains intact.").

Petitioner respectfully submits that the deprivations which he suffered at the hands of Secretary Stalder, and others, violated clearly established constitutional rights, and in no way can Secretary Stalder's pre or post-KATRINA action and/or inaction towards Petitioner be said to have been "objectively reasonable".

Accordingly, Petitioner avers that his claims against Secretary Stalder in his individual capacity, should not have been dismissed at this early stage of the proceedings, "on-the-papers".[11]

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[11] And, of course, if the State of Louisiana has waived 11th Amendment immunity from being required to litigate the claims brought against it in Federal Court, then the claims against Secretary Stalder in his official capacity, and against the Louisiana Department of Public Safety and Corrections, should not have been dismissed, either.

IV. IT IS HORNBOOK LAW THAT STATE DEPARTMENT HEADS, SUED INDIVIDUALLY, ARE NOT IMMUNE FROM CLAIMS FOR PROSPECTIVE INJUNCTIVE RELIEF

Using the ACLU report as a backdrop, Petitioner alleged a serious cause of action against Secretary Stalder, and others, for prospective injunctive relief in order to ensure that present and future inmates of the Orleans Parish Prison facilities are never again subjected to the "horrible", unconstitutional conditions to which Petitioner in this case was subjected, prior to and after Hurricane KATRINA. More particularly, Petitioner's claims for prospective injunctive relief was pleaded as follows:

> That all defendants be ordered and required to do the following:
>
> 1. Design and implement a coordinated emergency plan to ensure that all prisons and jails are capable of quickly and safely evacuating before the next disaster strikes. "No Evacuation Plan can be Located". See p. 89 of ACLU/NIC Report.
>
> 2. Downsize the jail by ending the practice of holding state and federal prisoners. "Business as usual: The Return of Prisoners to OPP". See pp. 87-90 of the ACLU/NIC Report.

3. Implement reforms to decrease the number of pre-trial detainees held at OPP. "Severe and sustained overcrowding". See p. 90 of ACLU/NIC Report.

4. Convene a Blue Ribbon Commission to develop and implement a full set of recommendations for detention reform.

5. Reduce the use of juvenile detention by exploring viable alternatives to detention.

6. Begin to view detention as a process rather than a place.

7. Appoint an Independent Monitor.

8. Work with officials at the State, local and federal levels to implement a coordinated emergency response plan that works across departmental boundaries.

9. Conduct regular audits of local jails holding state prisoners.

10. Commence an investigation into the treatment of prisoners at OPP and at various receiving facilities, to discover whether human and civil rights violations occurred. See the entire ACLU/NIC Report. Petitioner respectfully submits that these claims for prospective injunctive relief were laudable goals and

that they should not have been summarily dismissed.

V. EVEN IF 11TH AMENDMENT IMMUNITY WAS NOT WAIVED BY THE STATE, ET AL., FAILURE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER STATE TORT CLAIMS AGAINST THE STATE CONSTITUTED AN ABUSE OF DISCRETION

Petitioner respectfully submits that, if the State, et al., waived 11th Amendment immunity by virtue of its post-KATRINA litigating conduct, then Petitioner's State tort claims against the State, et al., were properly brought in Federal Court. In the alternative, however, Petitioner avers that the District Court's the failure to exercise supplemental jurisdiction over Petitioner's tort claims against the State constituted an abuse of discretion.

CONCLUSION

For the above and foregoing reasons, Petitioner respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 07-30589

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROBERT FAIRLEY; RONALD GEORGE, on their own behalf(s) and on behalf of all individuals similarly situated; NATHANIEL CARR; KEVIN GREEN; FAY HARDY; TYRELL LEBLANC; LADOIA SMITH; CLIFTON THOMPSON,
Plaintiffs - Appellants;
BARBARA ANN ANDERSON; ET AL,
Appellants

v.

RICHARD L STALDER, Secretary Department of Public Safety and Corrections, Defendant - Appellee

August 6, 2008, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

JUDGES: Before SMITH, WIENER, and HAYNES, Circuit Judges.

OPINION

PER CURIAM:*

Plaintiffs-Appellants Robert Fairley and Ronald George, on their own behalves and on behalf of all individuals similarly situated, et al. ("Fairley") appeal dismissal of their claims against Louisiana Department

of Public Safety and Corrections Secretary Richard Stalder, in both his individual and official capacities.[1] Fairley contends that (1) the State of Louisiana waived its sovereign immunity either constructively or by its litigation conduct, (2) Congress abrogated Louisiana's sovereign immunity by attaching "strings" to funds it granted to the State, (3) Louisiana is a "person" subject to suit under 42 U.S.C. § 1983 (2000), and (4) the claims against Stalder in his individual capacity were improperly dismissed. Concluding that these contentions are wholly without merit, with some bordering on frivolous, we affirm their dismissal by the district court.

I. FACTS AND PROCEEDINGS

Fairley filed a putative class action in the district court on behalf of inmates and former inmates of penal facilities in Orleans Parish[2] prior to and in the aftermath of Hurricane Katrina. The complaint sought damages stemming from the alleged deprivation and violation of federal constitutional rights and rights under Louisiana law caused by the State of Louisiana, the Louisiana Department of Public Safety and Corrections (the "DOC"), Stalder, in his individual and official capacities, the Orleans Parish Criminal Sheriff's Office, Orleans Parish Criminal Sheriff Marlin Gusman, in his individual and official capacities, and unnamed deputies, officers, and troopers.

The complaint alleged that despite a declaration of emergency by Louisiana Governor Kathleen Blanco on August 26, 2005, and a mandatory evacuation order issued by New Orleans Mayor Ray Nagin on August 28, 2005, both in advance of Hurricane Katrina's landfall on

August 29, 2005, the defendants failed to plan for evacuation of the plaintiffs, to evacuate the plaintiffs, and to provide food, water, clothing, bedding, sanitary facilities, and medication. The conditions Fairley describes after Katrina are deeply troubling: abandonment by the defendants; incarceration under lock and key in fetid conditions without food, water, or sanitary facilities and without information as to when assistance might come; and immersion in "toxic soup" during evacuation to a filthy, hot, and uncomfortable highway overpass. He claims, under various theories, that these acts and omissions violated his rights, and those of others similarly situated, under the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution, as well as under Louisiana law. Suit for relief on the federal claims was brought pursuant to 42 U.S.C. § 1983, and supplemental jurisdiction was asserted for the state law claims.

Louisiana, the DOC, and Stalder, in his official capacity, moved to dismiss the state law claims under Federal Rule of Civil Procedure 12(b)(1) and to dismiss the § 1983 claims under Rule 12(b)(6), asserting sovereign immunity and contending that Louisiana and the DOC are not "persons" susceptible to suit under § 1983. Stalder also moved under Rule 12(b)(6) to dismiss all federal claims against him in his individual capacity under the doctrine of qualified immunity and to dismiss all state claims under Louisiana Revised Statutes sections 9:2798.1 and 29:735.

Fairley then filed a first amended complaint, which added additional plaintiffs. After further motion practice, the magistrate judge to whom the case had been referred ordered Fairley to file another amended

complaint to comply with the requirement, for cases in which qualified immunity has been asserted as a defense, that plaintiffs plead "with factual detail and particularity, not mere conclusionary allegations"[3] any claims against Stalder in an individual capacity. This second amended complaint was filed and included, inter alia, new claims for prospective injunctive relief. Fairley's effort to comply with the heightened pleading standard for qualified immunity cases consisted of a four-line paragraph purporting to incorporate by reference, in toto, the American Civil Liberties Union ("ACLU") National Prison Project report entitled Abandoned & Abused: Orleans Parish Prisoners in the Wake of Hurricane Katrina.

The magistrate judge recommended that all state and federal claims against Louisiana and the DOC be dismissed on grounds of sovereign immunity, and that all claims against Stalder in his official capacity be dismissed because he is not a person susceptible to suit under § 1983 in his official capacity. The district court adopted the magistrate judge's report and recommendations and dismissed all claims against Louisiana, the DOC, and Stalder in his official capacity pursuant to Rules 12(b)(1) and 12(b)(6). The district court also dismissed the claims against Stalder in his individual capacity under Rule 12(b)(6). Leave to amend a third time was denied, and the district court dismissed Fairley's claims against Stalder for prospective injunctive relief.[4] An unopposed motion for a partial final judgment under Rule 54(b) as to all claims for damages and injunctive relief against Stalder in his individual and official capacities was then granted. This timely appeal followed.

II. ANALYSIS

A. Standard of Review

We review de novo a district court's dismissal of claims under Rules 12(b)(1) and 12(b)(6).[5] We "accept all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff" and do not dismiss a claim "unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that it could prove consistent with the allegations in the complaint."[6] "However, conclusory allegations will not suffice to prevent a motion to dismiss, and neither will unwarranted deductions of fact."[7]

When claims have been asserted under § 1983 against a government official, plaintiffs "must plead specific facts that, if proved, would overcome the individual defendant's immunity defense; complaints containing conclusory allegations, absent reference to material facts, will not survive motions to dismiss."[8] "When a public official pleads the affirmative defense of qualified immunity in his answer [and] the district court . . . require[s] the plaintiff to reply to that defense in detail[,] . . . . the reply must be tailored to the assertion of qualified immunity and fairly engage its allegations."[9] Finally, "[i]n deciding a motion to dismiss[,] the court may consider documents attached to or incorporated in the complaint and matters of which judicial notice may be taken."[10]

B. Merits

1. Official-Capacity Claims Against Stalder

Fairley asserts claims against Stalder in his official capacity for both damages and injunctive relief.

a. Damages

We begin an analysis of Fairley's claim against Stalder in his official capacity for damages under § 1983 by quoting long and clearly established Supreme Court precedent on the matter: "[N]either a State nor its officials acting in their official capacities are 'persons' under § 1983."[11] As § 1983 only provides a remedy against a "person," the dismissal of Fairley's § 1983 claims was indisputably proper.

The claims asserted against Stalder in federal court on state law grounds[12] for money damages, although not barred by Will v. Michigan Department of State Police,[13] must still overcome Louisiana's Eleventh Amendment immunity.[14] Fairley asserts five theories for his conclusion that this immunity is overcome: (1) Louisiana has waived its sovereign immunity by litigating other Hurricane Katrina-related suits in federal court as a plaintiff; (2) Louisiana has constructively waived its sovereign immunity by participating in various federal programs; (3) Louisiana has waived its sovereign immunity by statute and constitutional provision; (4) Congress abrogated Louisiana's sovereign immunity as to the issues in the case, namely, flood control, hurricane protection, prison reform, and disaster preparation and response; and (5) the federal judiciary has "badly misconstrued" the Eleventh Amendment or it "does not apply under the facts and circumstances of this case." As to the final "theory," whatever its merit, we are unable to act on it as "only the Supreme Court may overrule a Supreme

Court decision."[15] And, as we show below, Supreme Court precedents clearly speak to each of Fairley's contentions.

The first theory fails when analyzed as a litigation-conduct waiver.[16] There is an interesting argument to be made that invocations of federal jurisdiction in related suits waive sovereign immunity as to other suits. This argument emerges from language in Lapides v. Board of Regents of the University System of Georgia, in which the Supreme Court distinguished litigation-conduct waivers from other kinds of (repudiated) constructive waivers.[17] There the Court said:

> [A]n interpretation of the Eleventh Amendment that finds waiver in the litigation context rests upon the Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness, and not upon a State's actual preference or desire, which might, after all, favor selective use of 'immunity' to achieve litigation advantages.[18]

Fairley, however, has made no effort to link other pending Katrina litigation to this case in a way that would highlight potential "inconsistency, anomaly, and unfairness." He asserts that this litigation and the Louisiana v. United States[19] cases arise out of the "same transactions and occurrences" and are "logically related" to this case because they all relate to the failures of levees and retaining walls after Hurricane Katrina. Additionally, he contends that the evidence in these cases will be the same as in the instant litigation. These observations, without more particularized development

to demonstrate the potential for "inconsistency, anomaly, and unfairness" (particularly anomaly, which we do not, without more, see here), or without an elaboration of why the cases arise out of the "same transactions and occurrences," are woefully insufficient to trump Louisiana's sovereign immunity.

The second theory, constructive waiver, is similarly meritless. Even if constructive waiver arguments remain viable,[20] a waiver of this type may be found only when a congressional desire to make states liable is found in the "unmistakable language in the statute itself."[21] That not being the case here (or, counsel not having invited our attention to any such statutory language), discovery is unnecessary and dismissal is appropriate.[22]

The third waiver argument advanced by Fairley turns on the contention that Louisiana has waived sovereign immunity expressly by constitutional provision and statute. Under the Supreme Court's rubric, however, an express waiver may be found only when a provision expresses "the State's intention to subject itself to suit in federal court."[23] There is no express consent to suit in federal court in section 10, article XII of the Louisiana Constitution or Louisiana Revised Statutes section 9:2798.1, the provisions cited by Fairley. Further, Louisiana Revised Statutes section 13:5106(A) provides: "No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court." These are the reasons that we have unequivocally stated, on numerous occasions, that Louisiana has not waived its Eleventh Amendment immunity in this manner.[24]

Finally, the contention that Congress has abrogated Louisiana's immunity in the areas of flood control, hurricane protection, prison reform, and disaster preparation and response is feckless. Undoubtedly, Congress may abrogate state sovereign immunity,[25] but only pursuant to a post-Eleventh Amendment grant of congressional power and then only through an unequivocal expression of intent to exercise of that power.[26] There are no allegations that flood control, hurricane protection, and disaster preparation and response statutes were enacted by Congress pursuant to a post-Eleventh Amendment power or that Congress attempted to abrogate, unequivocally or otherwise, state sovereign immunity from suit in these areas. Nevertheless, the plaintiffs request discovery on these matters. As a statute "must contain an unequivocal statement of congressional intent to abrogate,"[27] however, discovery is unwarranted here and dismissal is appropriate.

b. Injunctive Relief

Injunctive relief against Stalder is also unwarranted.[28] Ex Parte Young does permit suits against state officials to force compliance with the Constitution and federal law,[29] but Stalder is not the proper party from whom to obtain relief from harms Fairley may have suffered (or may fear suffering) in OPCSO facilities. We find instructive district courts opinions that describe in some detail the Louisiana framework governing parish penal facilities. In Galo v. Blanco, for example, the court dismissed claims against Stalder, Governor Blanco, and Mayor Nagin because "there is no legal basis for holding [the defendants] liable for the conditions of plaintiff's confinement within the Orleans Parish Prison system."[30]

We have examined Louisiana Revised Statutes sections 15:702, 15:704, 33:1435, and 33:4715, and we agree that day-to-day operation of the parish prison is the responsibility of the local sheriff, and that financing and maintenance are the responsibility of the local governing authority. Our analysis of sections 15:826 and 15:827, which establish the services and duties of the Department of Public Safety and Corrections, and section 15:823, which establishes the duties of the Director of Corrections, further supports this view. Accordingly, Stalder is not in a position to provide the requested relief.[31]

2. Individual-Capacity Claims[32]

Counsel for Fairley has abandoned any quarrel with the district court's determination that Stalder's defense of qualified immunity for federal claims against him individually was not overcome by Fairley's responsive pleading. Our searching review reveals no argument by Fairley, adequately briefed on appeal,[33] that engages this dispositive issue. Fairley's initial brief does not even contain the phrase "qualified immunity." Any references to Stalder lacking immunity generally are beyond conclusional. Fairley's reply brief, at which point it was too late to preserve the issue in any event,[34] is scarcely better. Accordingly, we will not disturb the district court's determination that Fairley did not adequate reply to Stalder's defense of qualified immunity.

As for the state law claims against Stalder, Fairley has again failed to brief the issue adequately. The district court was not able to find any allegations of action or inaction by Stalder individually in the complaint or in

the ACLU report that was purported to be incorporated by reference.[35] Other than a few regurgitations of portions of his complaint, the only remotely relevant portions of Fairley's appellate brief are those that state: "The State of Louisiana and Secretary Stalder, in particular, played a prominent role in what happened, and what is likely to happen 'next time.' . . . '[S]omeone' had to make the decision not to evacuate the inmates . . . . Other than Sheriff Gusman and/or Secretary Stalder, who were the 'someone's' who made this moronic and misery-causing decision?" At best these are the "unwarranted deductions of fact" that are not considered sufficient to survive a Rule 12(b)(6) challenge. The rest of the hyperbolized, meandering comments in that section of the brief have to do with the Eleventh Amendment and counsel's railings about the perceived injustice of the heightened pleading rules. Nowhere does Fairley point to a place in the complaint where he alleges action or inaction by Stalder individually, without which the state law claims fail.

III. CONCLUSION

For the foregoing reasons, the partial final judgment of the district court, dismissing all claims against defendant-appellant Richard L. Stalder, is, in all respects, AFFIRMED. We also GRANT Stalder's motion to strike sixty-one individuals from this appeal for want of jurisdiction over them or the order denying leave to add them below.[36] Therefore, the only plaintiffs-appellants subject to this judgment are Robert Fairley, Ronald George, Fay Hardy, Ladoia Smith, Nathaniel Carr, Kevin Green, Tyrell LeBlanc, and Clifton Thompson.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1]Fairley also contends that his claims against the State of Louisiana and the Louisiana Department of Public Safety and Corrections were improperly dismissed. As he only urges jurisdiction pursuant to 28 U.S.C. § 1291 as the basis for this appeal, however, dismissals outside of the Rule 54(b) partial final judgment entered by the district court cannot be considered by us at this juncture. Although it is possible for a district court's order to be final without explicit reference to Rule 54(b), counsel is required to direct our attention to language that "either independently or together with related parts of the record reflects the trial judge's clear intent to enter a partial final judgment under Rule 54(b)." *Kelly v. Lee's Old Fashioned Hamburgers, Inc.*, 908 F.2d 1218, 1220 (5th Cir. 1990) (en banc). The fact that the district court did enter a Rule 54(b) partial final judgment as to some of the claims dismissed in its earlier orders will be taken by us as some evidence that the court did not intend to create a final judgment for our review of the claims dismissed but not part of the Rule 54(b) partial final judgment.

[2]Each of the penal facilities named appears to be a unit within the Orleans Parish Criminal Sheriff's Office (the "OPCSO")

[3]The magistrate judge was quoting *Anderson v. Pasadena Independent School District*, 184 F.3d 439,

443 (5th Cir. 1999) (internal quotation marks omitted).

[4]The basis for this dismissal does not appear in the record, but from the motion Stalder filed in the district court, it appears to have been based on Rule 12(b)(6).

[5]*Bombardier Aerospace Employee Welfare Benefits Plan v. Ferrer, Poirot & Wansbrough*, 354 F.3d 348, 351 (5th Cir. 2003); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

[6]*Jones v. Greninger*, 188 F.3d 322, 324 (5th Cir. 1999).

[7]*United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 379 (5th Cir. 2003) (internal quotation marks and citations omitted).

[8]*Geter v. Fortenberry*, 849 F.2d 1550, 1553 (5th Cir. 1988)

[9]*Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995).

[10]*Humana Health Plan of Tex.*, 336 F.3d at 379.

[11]*Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989) (barring suits for money damages under § 1983 against states and state officials in their official capacity).

[12]Fairley claims that the alleged federal constitutional torts were also "practiced intentionally, with malice, and/or with reckless disregard for and/or with deliberate indifference to plaintiffs' federally protected rights, as well as plaintiffs' rights under State law."

[13]491 U.S. at 71. The state law claims are not barred by Will because they are not brought under § 1983.

[14]See *Edelman v. Jordan*, 415 U.S. 651, 663-64, 94 S. Ct. 1347, 39 L. Ed. 2d 662(1974)(barring suits against states and state officials in their official capacity for damages without mention of the state or federal nature of the claims); *Hughes v. Savell*, 902 F.2d 376, 378 (5th Cir. 1990).

[15]*Medellin v. Dretke*, 371 F.3d 270, 280 (5th Cir. 2004).

[16]See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002) ("[A] State's voluntary appearance in federal court . . . [is] a waiver of its Eleventh Amendment immunity." (emphasis added)); see also id. ("[A] State waives any immunity respecting the adjudication of a 'claim' that it voluntarily files in federal court." (emphasis added) (internal quotation marks omitted)); *Gunter v. Atl. Coast Line R.R. Co.*, 200 U.S. 273, 284, 26 S. Ct. 252, 50 L. Ed. 477 (1906) ("[W]here a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it . . . cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment." (emphasis added)); cf. College Sav. Bank v. Fla. Prepaid Post secondary *Educ. Expense Bd.*, 527 U.S. 666, 675, 119 S. Ct. 2219, 144 L. Ed. 2d 605 ("[O]ur test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." (internal quotation marks omitted)). Clearly, if invocations of a federal court's jurisdiction in one instance waived a state's sovereign immunity for all other suits, the exception would swallow the rule and the test for waiver would hardly be "stringent."

Fairley's citation to *Clark v. Barnard*, 108 U.S. 436, 2 S. Ct. 878, 27 L. Ed. 780 (1883), is inapposite, as Louisiana has not intervened in the instant suit. If, for example, Louisiana should intervene in a case and assert a claim against the plaintiffs, but simultaneously assert a defense of sovereign immunity against claims brought against it, a very different case, under Clark and Lapides, would be present. Further, if this case were consolidated with a case in which Louisiana were a plaintiff, perhaps a different case would be present before us. Whether Lapides goes much further than Clark is a question on which we do not pass today.

[17] 535 U.S. at 620.

[18] Id.

[19] E.g., Louisiana v. United States, No. 2:07-cv-05040 (E.D. La. filed Aug. 29, 2007)

[20]See *Edelman v. Jordan*, 415 U.S. 651, 673, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights and we see no place for it here.").

[21]*Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985). In fact, it is now more difficult for Congress to comply with this requirement from Atascadero after *Seminole Tribe v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), which ended the Court's experimentation with abrogation through pre-Eleventh Amendment congressional powers.

[22]Fairley does not make clear in his briefs whether he is arguing that a constructive waiver has arisen because of participation in the programs or because of an actual agreement between Louisiana and the United States. In a late filing with this court, devoid of argument or specific citations, Fairley's counsel provided a copy of an article by Gil Seinfeld, Waiver-in-Litigation: Eleventh Amendment Immunity and the Voluntariness Question, 63 OHIO ST. L.J. 871 (2002). Perhaps the only basis of support in it for Fairley's request for discovery is the case *Innes v. Kansas State University (In re Innes)*, 184 F.3d 1275 (10th Cir. 1999). There, the Tenth Circuit found a waiver of sovereign immunity in a contract between Kansas State University and the United States. We question the reasoning of the court in that case, particularly as *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 124 S. Ct. 1905, 158 L. Ed. 2d 764 (2004), addressed the same situation with different, and broader, reasoning. See Susan E. Hauser, Necessary Fictions: Bankruptcy Jurisdiction After Hood and Katz, 82 TUL. L. REV. 1181, 1202-09 (2008). Nevertheless, it is important to note that even Innes appears to recognize the necessity of a specific statutory or constitutional authorization for state officials to waive sovereign immunity by contract. See *Innes*, 184 F.3d at 1280 ("[T]hese cases . . . firmly establish that a state agent acting with proper authorization can effectuate a waiver . . . ." (emphasis added)). Fairley has not brought to our attention any authorization to enter into an agreement that waives immunity.

[23]*Atascadero*, 473 U.S. at 241 (emphasis in original).

[24] E.g., *Delahoussaye v. City of New Iberia*, 937 F.2d

144, 147 (5th Cir. 1991).

[25]See *Seminole Tribe v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

[26] See *id.* at 55, 65, 72.

[27]*Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005).

[28]The claims of former inmates for injunctive relief are moot. See *Herman v. Holiday*, 238 F.3d 660, 665 (5th Cir. 2001); *Cooper v. Sheriff, Lubbock County, Tex.*, 929 F.2d 1078, 1084 (5th Cir. 1991); *Beck v. Lynaugh*, 842 F.2d 759, 762 (5th Cir. 1988). As some of the named plaintiffs may still be incarcerated, although whether or not that is so is hard to tell from Fairley's briefing, we nevertheless explain why the claims would fail even if they were not moot.

[29]209 U.S. 123, 155-56, 166-67, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

[30]No. Civ.A. 06-4290, 2006 U.S. Dist. LEXIS 72657, 2006 WL 2860851, at *2 (E.D. La. Oct. 4, 2006); *Broussard v. Foti*, No. Civ.A. 00-2318, 2001 U.S. Dist. LEXIS 2937, 2001 WL 258055, at *1-2 (E.D. La. Mar. 14, 2001).

[31]See *Broussard*, 2001 U.S. Dist. LEXIS 2937, 2001 WL 258055, at *1-2; see also *O'Quinn v. Manuel*, 773 F.2d 605, 609 (5th Cir. 1985) ("The administration of the jails is the province of the sheriff."); *Howard v. Fortenberry*, 723 F.2d 1206, 1212-13 (5th Cir. 1984), vacated in part, 728 F.2d 712 (5th Cir. 1984) (noting the absence of a duty for the Secretary of the Louisiana Department of

Public Safety and Corrections to supervise local prison officials). It is questionable whether anyone can be ordered to implement some of Fairley's requests. For example, it is doubtful that a district court could enjoin a person to "|b|egin to view detention as a process rather than a place."

[32] It appears at one point that Fairley is requesting injunctive relief against Stalder in an individual capacity. As Stalder has no control over OPCSO facilities in his official capacity, it is odd to suggest that he might have such control in an individual capacity. The claim, if in fact made, is frivolous.

[33] See *Audler v. CBC Innovis Inc.*, 519 F.3d 239, 255 (5th Cir. 2008) ("A party waives an issue if he fails to adequately brief it. Though pro se litigants' briefs are liberally construed so as to avoid waiver of issues, the indulgence for parties represented by counsel is necessarily narrower." (internal quotation marks and citations omitted)). Were we to grant the same level of indulgence that we would to a pro se appellant, the shape of the briefs filed by counsel for Fairley prevents even a liberal construction from preserving the issue.

[34]See *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

[35]To describe the report as incorporated and properly part of the complaint is to be generous. It was attached without any particular references or evidence that it contained material concerning the plaintiffs in the action. We join the district court in condemning this type of trial practice. And, we analogize this method of pleading to "scattershot" rather than to "buckshot" as did the district court.

[36]We granted, in a per curiam order, Stalder's motion to strike the eight duplicate names that appeared in the notice of appeal sent to us. A motion to strike the names of sixty-one individuals who were not parties to the litigation below was carried with the case. These individuals were the subject of a failed (third) attempt by Fairley's counsel to amend the complaint in the district court. In denying the motion for leave to amend a third time, the magistrate judge said: "The proposed Third Supplemental and Amending Complaint appears to be a veiled effort to continue to add party-plaintiffs rather than properly pursue the class action certification. The repeated addition of named plaintiffs is prejudicial to the defendants and fails to account for the applicable statute of limitations and the relating-back doctrine . . . . To allow the plaintiffs to file the Third Supplemental and Amended Complaint would be prejudicial and futile." Rather than appeal this determination at the appropriate time, Fairley's counsel surreptitiously attempted to add these sixty-one plaintiffs to this appeal. When caught by counsel for Stalder, counsel for Fairley responded: "[P]laintiffs/appellants were erroneously denied leave to amend their Complaint . . . . They are aggrieved by this erroneous ruling . . . . They are 'appellants' no matter how one may look at this case."

Denial of a motion for leave to amend a complaint is ordinarily not immediately appealable, *Wallace v. County of Comal*, 400 F.3d 284, 291-92 (5th Cir. 2005), and it is quite unclear that any cognizable attempt to appeal that denial was made before slapping these extra names on the case. Further, the Federal Rule of Civil Procedure 54(b) partial final judgment in the district court did not include denial of this motion. And

it is axiomatic that we only possess appellate jurisdiction, absent another basis urged, over final decisions, making appeal of this motion for leave to amend improper. See 28 U.S.C. § 1291 (2000). Even if we did possess jurisdiction, it was clearly not an abuse of discretion for the district court to deny leave to amend a third time, particularly given counsel's attempt to add plaintiffs endlessly without regard for the district court's prior orders. Therefore, as to this appeal, the sixty-one individuals are nonparties.

Nonparties may appeal only after satisfying a three-part test that focuses on actual participation by the nonparties, the equities in favor of hearing them, and the personal stake of the nonparties in the outcome. See *Castillo v. Cameron County, Tex.*, 238 F.3d 339, 349-50 (5th Cir. 2001). Fairley's counsel has made absolutely no effort to identify this test or to apply it, and our sua sponte examination reveals it would be improper to allow these nonparties to appeal.

We remind counsel of Federal Rule of Appellate Procedure 38 for our purposes, and, for his purposes, we remind him of Louisiana Rules of Professional Conduct 1.1, 3.1, and 3.3(a)(2).

Filed 3/27/2007
CIVIL ACTION NO. 06-3788 SECTION "N" (4)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ROBERT FAIRLEY, ET AL

VERSUS

THE STATE OF LOUISIANA, ET AL

ORDER and REASONS

Before the Court is a Motion to Dismiss Defendant Secretary Richard Stalder (Rec. Doc. No. 5), filed by the defendant, the Secretary of the Louisiana Department of Corrections Richard Stalder, in his individual capacity. The plaintiffs opposed the motion and it was heard with oral argument before the Magistrate Judge on November 29, 2006.[1] The Court, having reviewed *de novo* the pleadings, the record, and the recorded oral argument, hereby REVOKES the referral to the Magistrate Judge as to this motion and issues the following opinion.

I. Factual Background

The plaintiffs, Robert Fairley ("Fairley") and Ronald George ("George"), filed this purported class action,[2] civil rights complaint against the State of Louisiana, the Louisiana Department of Public Safety and Corrections ("DOC"), and DOC Secretary Richard Stalder ("Stalder"), in his individual and official capacities, the Orleans Parish Criminal Sheriff's

Office, Orleans Parish Criminal Sheriff Marlin Gusman, in his individual and official capacities, and Deputies, Officers and/or Troopers John Doe and Richard Doe (collectively referred to by the plaintiffs as "the State defendants"). These plaintiffs have since filed a First Supplemental and Amended Complaint to add additional plaintiffs, Ladoia Smith, Tyrell LeBlanc, Clifton Thompson, Nathanial Carr, Kevin Green, and Fay Hardy, and to name other potential class members.[3] This complaint added no substantive claims.

The plaintiffs allege that, at all times relevant, they were inmates housed within the Orleans Parish Prison system ("OPP"), composed of the House of Detention, Templeman Jail, Phases I, 2, 3, 4 and 5, and the South White Street facility.[4] The plaintiffs claim that, on August 28, 2005,[5] Mayor Ray Nagin of the City of New Orleans called for a mandatory evacuation of the City in anticipation of the landfall of Hurricane Katrina. The plaintiffs complain that, in spite of the mandatory evacuation, the State defendants took no action to move the plaintiffs to elevations above the flood-plain and made no provisions to stockpile the OPP facilities with food, water, clothing, bedding, sanitary facilities or medication.[6]

The plaintiffs further allege that, after Hurricane Katrina made landfall, they were abandoned and remained locked within the facilities within OPP.[7] Plaintiffs also allege that, when help arrived days later, they were exposed to and immersed in the "toxic soup" which inundated New Orleans. They claim that, from the prison, they were transported to an overpass where they remained for several hours in the hot sun

and in filthy and extremely uncomfortable conditions, before being sent out of New Orleans to State operated penal facilities.

The plaintiffs claim that the State defendants violated the U.S. Constitution and state law "in an official capacity" for committing "the following constitutional torts" of abandonment, assault, battery and excessive force, failure to have an emergency plan, failure to follow existing emergency plans, infliction of physical injury, intentional and/or negligent infliction of cruel and unusual punishment, intentional and/or negligent infliction of mental anguish and emotional distress, and intentional and/or negligent failure to provide food, water, clean clothes and bedding, sanitary facilities, and medication.[8] The plaintiffs seek to recover monetary damages, prospective injunctive relief, attorneys' fees, interest, and costs as a result of the events described above.

II. Standard of Review

Under Rule 12(b)(6), the court may dismiss a complaint if it lacks jurisdiction over the subject matter or for failure to state a claim upon which any relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss, the court must accept as true all well-pleaded facts and must draw all reasonable inferences from those allegations in the plaintiffs favor. *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). A complaint shall only be dismissed if it is beyond doubt that the plaintiff can prove no facts in support of his claim that would entitle him to relief. *Home Builders Assn of Ms., Inc. v. City of Madison, Ms.*, 143 F.3d 1006, 1010 (5th Cir. 1998).

In resolving a Rule 12(b)(6) motion, the court is generally limited to considering only those allegations appearing on the face of the complaint. However, matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint may be taken into account. *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3rd Cir. 1990). Finally, while conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent the granting of a Rule 12(b) motion to dismiss, such motions are viewed with disfavor and are rarely granted. *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 246 (5th Cir. 1997).

III. Stalder's Motion to Dismiss (Rec. Doc. No. 5)

Stalder filed the instant Motion to Dismiss seeking dismissal of the federal claims against him in his individual capacity under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for which relief can be granted under the doctrine of qualified immunity.[9] Stalder also seeks dismissal under Fed. R. Civ. P. 12(b)(6) of the state claims urged against him on the basis of statutory immunity afforded him under La. Rev. Stat. Ann. § 9:2798.1 and La. Rev. Stat. Ann. § 29: 735 and the plaintiffs' failure to identify any malicious or intentional conduct by Stalder.[10]

The plaintiffs opposed the motion, arguing that Stalder is a proper defendant and amenable to suit in federal court in his individual capacity.[11] The plaintiffs further argue that Stalder is not immune under state law based on the allegations in Paragraph 14 of the original Complaint, in which they aver that

the State defendants' actions and inactions "were willful, and constituted criminal, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct" which deprives them of the immunities and protections offered by La. Rev. Stat. Ann. §9:2798.1 and La. Rev. Stat. Ann. §29:735.

In response to a qualified immunity defense, raised here by Stalder, "plaintiffs suing governmental officials in their individual capacities must allege specific conduct giving rise to the constitutional violation." *Anderson v. Pasadena Indep. Sch.* Dist.,184 F.3d 439,443 (5th Cir.1999); *see also* Fed. R. Civ. P. 7(a). The heightened pleading standard applicable in cases defended on qualified immunity grounds requires a plaintiff to plead "with factual detail and particularity, not mere conclusory allegations." Id.; *see also Schultea v. Wood*, 47 F.3d 1427, 1430 (5th Cir.1995). In the § 1983 context, this standard translates in part into the requirement that the plaintiff "identify defendants who were either personally involved in the constitutional violation or whose acts are causally connected to the constitutional violation alleged." *Anderson*, 184 F.3d at 443; *DeLeon v. City of Dallas*, 141 Fed. Appx. 258, 261 (5th Cir. 2005).

For these reasons, after hearing oral argument on Stalder's motion, the Magistrate Judge ordered the plaintiffs to file an amended or supplemental complaint setting forth facts sufficient to reply to the qualified immunity defense raised by the defendant Stalder in his individual capacity as required by Fed. R. Civ. P. 7(a) and the precedent cited supra.

The plaintiffs timely filed a Second Supplemental and Amending Complaint which will be addressed with particularity later in this opinion.[12] Stalder thereafter filed a Supplemental Memorandum in support of his motion arguing, relevant to this motion, that plaintiffs' Second Supplemental and Amending Complaint failed to allege constitutional violations by Stalder with the factual detail and particularity required by law to overcome the qualified immunity defense.[13]

Stalder further argues that the ACLU Report,[14] submitted as an attachment to the complaint, is insufficient to state a particularized claim and is also inappropriate method of pleading under Fed. R. Civ. P. 8. Stalder also suggests that counsel for the plaintiff has been admonished by another District Judge of this Court that "buckshot pleading" by means of extraneous attachments is a "waste of this Court's resources." *Berthelot v. Boh Brothers Const. Co., LLC, 2006* WL *2256995, slip op. at* *8) (E.D. La. Jul. *19, 2006)* (Duval, J.) (addressing matters in the consolidated case of *O'Dwyer v. United States*, Civ. Action No. 05-4181 "K").

III. Analysis

Stalder argues that the plaintiffs have failed to allege an identifiable constitutional right, or state law, which was specifically violated by him. He further contends that the plaintiffs' three complaints fail to allege that his conduct was unreasonable or rose to the level of intentional indifference necessary to state a claim against him in his individual capacity under federal or state law.

Under Title 42 U.S.C. § 1983, the Court's first inquiry is to determine whether the plaintiff has demonstrated that Richard Stalder, in his individual capacity, "was personally involved in the acts causing the deprivation of his constitutional rights or a causal connection exists between an act of the official and the alleged constitutional violation." *Douthit v. Jones*, 641 F.2d 345 (5th Cir. 1981); *see also Watson v. Interstate Fire & Casualty* Co., 611 F.2d 120 (5th Cir.1980). Similarly, under Louisiana law, the plaintiff must show that the particular conduct complained of was intentional so as to cause the physical results, *Pinsonat v. JE Merit Contractors, Inc.*, 962 F. Supp. 848 (M.D. La. 1996), or that the conduct bears a causal connection with the injury to the plaintiff and that the defendant breached a duty imposed against him to guard against the particular risk involved. *Edwards v. Louisville Ladder Co.*, 796 F. Supp. 966 (W.D. La. 1992); *Davis v. Watt*, 851 So.2d 1119 (La. 2003); *Payn v. West Jefferson General Hospital*, 385 So.2d 40 (La. App. 4th Cir. 1980).

Short of identifying him as a defendant, the original Complaint and the First Supplemental and Amended Complaint make no mention of Stalder in particular or any specific act or omission by him. For example, the First Supplemental complaint merely adds additional parties and jurisdictional statements. The original Complaint addresses itself to "the State defendants" collectively. These collective accusations made against "the State defendants" fail to distinguish the actions of any one defendant from another and fails to identify a particular Constitutional violation by Stalder.

The original Complaint also contains no specific state law violation attributed to Stalder in his individual capacity. In fact, the original Complaint refers to a list of state law torts, e.g. assault, battery, negligence, categorized as "constitutional torts," and attributes them to "the State defendants" collectively and "in an official capacity" (emphasis added).[15] Contrary to plaintiffs opposition argument, there is no accusation against Stalder or any defendant in an individual capacity in that portion of the complaint.

Without some indication of what he is accused of doing or not doing, the plaintiffs failed in the first two complaints to state a cognizable claim against Richard Stalder individually or link him in any way to a particular alleged constitutional wrong or state law violation. In an effort to allow the plaintiff an opportunity to correct this, the Magistrate Judge ordered the plaintiffs to amend or supplement their Complaint to counter the qualified immunity defense in this civil rights action, as allowed *by Anderson*, 184 F.3d at 443, *Schultea*, 47 F.3d at 1430, and Fed. R. Civ. P. 7(a).

In the Second Supplemental and Amending Complaint filed pursuant to that order, the plaintiffs again amended their jurisdictional statement to add additional allegations to again suggest a waiver of Eleventh Amendment immunity by the State defendants and outlining certain prospective injunctive relief sought.[16] The Eleventh Amendment immunity issue has already been resolved against the plaintiffs.[17]

In addition, in Paragraph II of this latest complaint,

the plaintiffs stated the following basis for liability:[18]

> By amending their liability allegations against the State defendants by pleading the contents of the attached American Civil Liberties Union, National Prison Project Report entitled: "Abandoned & Abused; Orleans Parish Prisoners in the Wake of Hurricane Katrina",[sic] which is available at www.ACLU.org.

This averment is again addressed to the State defendants collectively. Nothing in the Second Supplemental and Amending Complaint states facts, conclusory or otherwise, from which this Court can glean anything attributable to Stalder individually. The plaintiffs' amended liability allegation is not sufficient to state a claim or overcome qualified immunity. *Binge v. Stalder*, 54 Fed. Appx. 793 (5th Cir. 2002). Furthermore, an attempt to impute allegations brought against another defendant to Stalder will not meet the heightened pleading requirement in a case involving a qualified immunity defense. *DeLeon*, 141 Fed. Appx. at 263.

The latest complaint also makes no reference to any particular page within the 141 page ACLU Report wherein a claim is brought against Richard Stalder in his individual (or any other) capacity. The Court, nevertheless, recalls that counsel referenced two pages, 119 and 127, of that report during oral argument. A review of these pages reveals nothing related to an action or inaction by Stalder individually.[19]

Furthermore, a perusal of the entire report shows that it does not contain information from or regarding the named plaintiffs in this action. The ACLU report is, based on the authors' description, a compilation of the personal accounts of the unfortunate experiences of inmates and others persons affected by Hurricane Katrina and the evacuation from OPP and other prisons.[20] The contributing authors, representing numerous special interest groups, compiled the interviews "so that they are not forgotten."[21] While the authors included some recommendations for future improvement for OPP in the preface, the report is nothing more than a diary of the personal experiences of select persons, none of whom are plaintiffs in this action.[22]

The plaintiffs' pleading of the contents of the ACLU Report, therefore, is not sufficient to state a claim on behalf of these plaintiffs against Richard Stalder in any capacity. The plaintiffs have not stated sufficiently, or in any way, a constitutional violation or state law violation specifically attributable to Stalder in his individual capacity or that Stalder in his individual capacity acted unreasonably or with the intentional indifference[25] necessary to overcome the qualified immunity defense to the claims against him.

In sum, the plaintiffs have wholly failed to articulate a cognizable federal or state law claim or basis for liability attributable to Stalder in his individual capacity. The plaintiffs offer no fact or allegation, conclusory or otherwise, to support a claim against Stalder in his individual capacity. For the foregoing reasons,

IT IS ORDERED that the Motion to Dismiss Defendant Secretary Richard Stalder (Rec. Doc. No. 5) is GRANTED and the federal and state claims against Richard Stalder in his individual capacity are DISMISSED WITH PREJUDICE.

New Orleans, Louisiana, this 27th day of March, 2007.

Footnotes

[1]Rec. Doc. No. 30.

[2]The plaintiffs have made no effort to certify a class in this instance.

[3] Rec. Doc. No. 8, First Supplemental and Amending Complaint.

[4]Rec. Doc. No. 1, p.2, Par. 3.

[5]The plaintiffs' complaint erroneously references this monumental date as August 28, 2006.

[6]Rec. Doc. No. 1, p.4, Par. 8.

[7]Rec. Doc. No. 1, p. 4, Par. 9.

[8]Rec. Doc. No. 1, p.5, Par. 10.

[9]Qualified immunity shields government officials from individual liability for performing discretionary functions, unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known. Colston v. *Barnhart*, 130 F.3d 96, 98 (5th Cir. 1997); *Coleman v.*

Houston Indep. Sch. Dist., 113 F.3d 528, 532-33 (5th Cir.1997) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity provides for mistaken judgment and protects "all but the plainly incompetent or those who knowingly violate the law." *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir.1994). A qualified immunity defense is analyzed under a two-step process. *Jacobs* v. West *Feliciana Sheriffs Dep't*, 228 F.3d 388, 393 (5th Cir. 2000); *Hare v. City of Corinth*,135 F.3d 320, 325 (5th Cir. 1998) (on appeal after remand); *Colston*, 130 F.3d at 99.

The first step is to determine whether the plaintiffs have alleged a violation of a clearly established constitutional right under currently applicable constitutional standards. *Jacobs*, 228 F.3d at 393; *Hare*, 135 F.3d at 325; Coleman, 113 F.3d at 533. In determining whether a right is clearly established, this court is confined to precedent from the Fifth Circuit and the Supreme *Court. Shipp v. McMahon*, 234 F.3d 907, 915 (5th Cir. 2000), *cert. denied*, 532 U.S. 1052 (2001). Therefore, a right is considered to be clearly established if, based on pre-existing law, the unlawfulness of the conduct in question is apparent. Id. In other words, the right is clearly established if its "'contours ... [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right."' Id. (quoting *Anderson v. Creighton*, 483 U. S. 635, 640 (1987)) (other citations omitted); *accord Foster v. City of Lake Jackson*, 28 F.3d 425, 29 (5th Cir.1994).

When the plaintiff alleges a constitutional violation so as to satisfy the first prong, the second step requires the *Court* to determine whether defendant's conduct

was objectively reasonable under existing clearly established law. *Glenn v. City of Tyler*, 242 F.3d 307, 312 (5th Cir. 2001); dacohs, 228 F.3d at 393; *Foster*, 28 F.3d at 428-29. Officials who act reasonably but mistakenly are still entitled to the defense. Qualified immunity gives ample room for mistaken judgments, and protects all but the plainly incompetent or those who knowingly violate the law. *Anderson v. Creighton*, 483 U.S. at 641; *Malley v. Briggs*, 475 U.S. 335, 341, 343 (1986); *Hare*, 135 F.3d at 325. The *court* can determine as a matter of law whether a defendant is entitled to qualified immunity and, specifically, whether a defendant's conduct was objectively reasonable. *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000); *White v. Balderama*, 153 F.3d 237, 241 (5th Cir.1998); *Colston*,130 F.3d at 99.

[10]Rec. Doc. No. 5, Motion to Dismiss; *see also*, Rec. Doc. No. 31, Reply Memorandum.

[11]Rec. Doc. No. 24, Memorandum in Opposition.

[12]Rec. Doc. No. 32.

[13]Rec. Doc. No. 36, Supplemental Memorandum in Support.

[14]Counsel for the plaintiff submitted a copy of the ACLU report to the Magistrate Judge at oral argument.

[15]Rec. Doc. No. 1, p.5, Par. 10.

[16]Rec. Doc. No. 32, Second Supplemental and Amending Complaint.

[17]Rec. Doc. No. 48.

[18]Id., at Paragraph II.

CIVIL ACTION NO. 06-3788 SECTION "N" (4)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ROBERT FAIRLEY, ET AL

VERSUS

THE STATE OF LOUISIANA, ET AL

March 23, 2007, Decided
March 23, 2007, Filed

JUDGES: KURT D. ENGELHARDT, United States District Judge.

ORDER AND REASONS

Before the Court are Plaintiffs'[1] Objections to the Report and Recommendation of the Magistrate Judge in this matter.

The facts are as set forth by the Magistrate Judge in her Report and Recommendation. (Rec. Doc. No. 37) The Magistrate Judge recommended that the Motion to Dismiss filed by the Defendants State of Louisiana; State of Louisiana, through the Department of Public Safety and Corrections; and Secretary Richard Stalder, in his official capacity only (Rec. Doc. No. 6) be granted, and such claims be dismissed with prejudice for lack of jurisdiction and for failure to state a claim upon which relief can be granted. The Magistrate Judge also recommended that the Rule 12(b)(6) Motion to Dismiss filed by the Orleans Parish Criminal Sheriff's Office be

granted, and such claim be dismissed with prejudice. For the reasons stated herein, the Court OVERRULES Plaintiffs' objections, and ADOPTS the Magistrate Judge's Report and Recommendation as the ruling of the Court on these motions.

Plaintiffs object specifically to Part III A of the Magistrate Judge's ruling as it pertains to Eleventh Amendment immunity; Part III B, also dealing with Eleventh Amendment immunity; Part III C, pertaining to Stalder's arguments regarding Eleventh Amendment immunity, and Part V, the dismissals with prejudice on grounds of Eleventh Amendment immunity. Plaintiffs do not object to the recommendation that the claims against the Orleans Parish Criminal Sheriff's Office be dismissed with prejudice pursuant to Rule 12(b)(6).

Plaintiffs initially claim that the State of Louisiana waived its Eleventh Amendment immunity "by persistent invocation of the jurisdiction of the Federal Court system in Louisiana", which argument he contends was not addressed by the Magistrate Judge. To the contrary, however, the Magistrate Judge recognized that a waiver of Eleventh Amendment immunity *must be express.* See *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Welch v. Dep't of Highways,* 780 F.2d 1268, 1271-73 (5th Cir. 1986). See Page 6 of the Magistrate Judge s Report and Recommendation. Plaintiffs' objection cites no express waiver by the state.

Secondly, Plaintiffs object and claim they are entitled to conduct discovery to determine whether a waiver of Eleventh Amendment immunity occurred by virtue of

federal funding both prior to and since Hurricane Katrina. The Court finds this argument to be without merit. It is well settled that receipt of federal funds, in and of itself, cannot establish that a state has consented to suit in federal court. See, e.g., *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Conducting discovery in the general areas of "flood control, hurricane protection, prison reform and disaster preparation and response", in a search for some waiver of immunity, amounts to nothing more than a fishing expedition which would serve only to significantly delay this matter and drive up the cost of this litigation.

Thirdly, Plaintiffs object to the Report and Recommendation on grounds that their Second Amended Complaint (Rec. Doc. No. 32) includes a claim for prospective injunctive relief, which the Magistrate Judge did not discuss. It is clear, however, that the Magistrate Judge's Report recommends the dismissal of claims *for monetary damages* against these Defendants, and does not include Secretary Stalder, in his individual capacity, nor does it include prospective injunctive relief. A Motion to Dismiss Stalder in his individual capacity is pending and will be the subject of a separate ruling. As to the claim for prospective injunctive relief, further motion practice designed to dispose of such a tenuous claim may be in order.

Lastly, Plaintiffs generally object to the Report and Recommendation claiming that the Eleventh Amendment "has been badly misconstrued by the judiciary, and does not apply under the facts and circumstances of this case." (Memorandum in Support of Objection, Page 5) Plaintiffs further claim that a waiver

of sovereign immunity occurred by virtue of Article 12, § 10(A) of the Louisiana Constitution of 1974 and by virtue of La. R.S. 9:2798.1. Such an argument, however, overlooks Article 12, § 10(C), which authorizes the legislature to "limit or provide for the extent of liability of the state, a state agency or a political subdivision in all cases, including the circumstances giving rise to liability and the kinds and amounts of recoverable damages." La. R.S. 9:2798.1 is accordingly a limitation of such liability. Subsection B of that statute states:

> Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties.

Accordingly, Plaintiffs' objections on these grounds are also OVERRULED.

For these reasons, the Report and Recommendation of the Magistrate Judge is APPROVED AND ADOPTED by this Court as its rulings on the subject motions, which are, as reflected on Page 9 of the Magistrate Judge's Recommendation, GRANTED, and such claims are dismissed with prejudice.

New Orleans, Louisiana, this 23rd day of March, 2007.

KURT D. ENGELHARDT

United States District Judge

Footnote

[1]Robert Fairley and Ronald George, on their own behalf(s) and on behalf of all individuals similarly situated, Nathaniel Carr, Kevin Green, Fay Hardy, Tyrell LeBlanc, Ladoia Smith and Clifton Thompson.

Filed 1/8/2007

CIVIL ACTION NO. 06-3788 SECTION "N" (4)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

ROBERT FAIRLEY, ET AL

VERSUS

THE STATE OF LOUISIANA, ET AL

REPORT AND RECOMMENDATION

Before the Court is a Motion to Dismiss Defendants State of Louisiana; State of Louisiana, through the Department of Public Safety and Corrections; and Secretary Richard Stalder (Rec. Doc. No. 6), filed by the defendants, the State of Louisiana, the Louisiana Department of Public Safety and Corrections and Secretary Richard Stalder (collectively referred to as "the State defendants"). This motion was opposed by the plaintiffs and was heard with oral argument before the undersigned Magistrate Judge on November 29, 2006.[1] Also before the Court is a Rule 12(B)(6) Motion to Dismiss (Rec. Doc. No. 19) filed by the Orleans Parish Criminal Sheriff's Office to which the plaintiffs have filed no opposition.

The defendants' motions, along with the case, were referred to a United States Magistrate Judge to conduct a hearing, including an Evidentiary Hearing, if necessary, and to submit proposed findings and

recommendations for disposition pursuant t Title 28 U.S.C. § 636(b)(1)(B) and (C), § 1915e(2), and § 1915A, and as applicable, Title 42 U.S.C. § 1997e(c)(1) and (2).

I. Factual Summary

The plaintiffs, Robert Fairley ("Fairley") and Ronald George ("George"), filed this purported class action,' civil rights complaint against the State of Louisiana, the Louisiana Department of Public Safety and Corrections ("DOC"), Secretary Richard Stalder, in his individual and official capacities, the Orleans Parish Criminal Sheriff's Office, Orleans Parish Criminal Sheriff Marlin Gusman, in his individual and official capacities, and Deputies, Officers and/or Troopers John Doe and Richard Doe. The plaintiffs allege that, at all times relevant, they were inmates housed within the Orleans Parish Prison system ("OPP"), composed of the House of Detention, Templeman Jail, Phases 1, 2, 3, 4 and 5, and the South White Street facility.fn3 The plaintiffs state that, on August 28, 2005,[4] Mayor Ray Nagin of the City of New Orleans called for a mandatory evacuation of the City in anticipation of the landfall of Hurricane Katrina. The plaintiffs complain that, in spite of the mandatory evacuation, the defendants took no action to move the plaintiffs to elevations above the flood-plain and made no provisions to stockpile the prison facilities with food, water, clothing, bedding, sanitary facilities or medication.

The plaintiffs allege that, after Hurricane Katrina made landfall, they were abandoned and remained locked within OPP.fn6 Plaintiffs further allege that, when help arrived days later, they were exposed to and immersed in the "toxic soup" which

inundated New Orleans. They claim that from the prison, they were transported to an overpass where they remained for several hours in the hot sun and in filthy and extremely uncomfortable conditions, before being sent out of New Orleans to State operated penal facilities.

The plaintiffs cite the defendants for violation of the U.S. Constitution and state law through abandonment, assault, battery and excessive force, failure to have an emergency plan, failure to follow existing emergency plans, infliction of physical injury, intentional and/or negligent infliction of cruel and unusual punishment, intentional and/or negligent infliction of mental anguish and emotional distress, and intentional and/or negligent failure to provide food, water, clean clothes and bedding, sanitary facilities, and medication. The plaintiffs seek to recover monetary damages, attorney's fees, interest, and costs as a result of the events described above.

II. Standards of Review of Motions to Dismiss

Under Rule 12(b)(1) and (6), the court may dismiss a complaint if it lacks jurisdiction over the subject matter or for failure to state a claim upon which any relief may be granted. *See* Fed. R. Civ. P. 12(b)(1), (6). The same standard is applied for a motion to dismiss brought under either Rule 12(b)(1) for lack of jurisdiction or under Rule 12(b)(6) for failure to state a claim for which relief can be granted. *Benton v. United States*, 960 F.2d 19, 21 (5th Cir. 1992).

In considering a motion to dismiss, the court must accept as true all well-pleaded facts and must

draw all reasonable inferences from those allegations in the plaintiffs favor. *Baker v. Putnal*, 75 F.3d 190,196 (5th Cir.1996). A complaint shall only be dismissed if it is beyond doubt that the plaintiff can prove no facts in support of his claim that would entitle him to relief. *Home Builders Ass'n of Ms., Inc. v. City of Madison, Ms.*, 143 F.3d 1006,1010 (5th Cir.1998).

In resolving a Rule 12(b) motion, the court is generally limited to considering only those allegations appearing on the face of the complaint. However, matters of public record, orders, items appearing in the record of the case and exhibits attached to the complaint may be taken into account. *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3rd Cir. 1990). Finally, while conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent the granting of a Rule 12(b) motion to dismiss, such motions are viewed with disfavor and are rarely granted. *Lowrey v. Texas A & M Univ.* Sys.,117 F.3d 242, 246 (5th Cir. 1997).

III. Motion to Dismiss Defendants State of Louisiana; State of Louisiana, through the Department of Public Safety and Corrections; and Secretary Richard Stalder (Rec. Doc. No. 6

The State defendants filed this motion alleging that they are not "persons" capable of being sued under 42 U.S.C. § 1983 and that they enjoy absolute sovereign immunity from suit in federal court under the Eleventh Amendment. The plaintiffs have opposed the motion arguing that the terms of the Eleventh Amendment and its immunity doctrine have been

misinterpreted by the federal courts and should not be applied here. Specifically, the plaintiffs argue that the very terms of the Eleventh Amendment limit the immunity to suits brought against a State by citizens of another state, which is not the case here.

A. Eleventh Amendment Immunity

The Eleventh Amendment to the United States Constitution reads as follows: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. While unapparent from the text, it is well established that this immunity extends to suits brought against a state by its own citizens. *See Hans v. Louisiana*, 134 U.S. 1, 16-21 (1890). The Supreme Court has repeatedly held that the Eleventh Amendment forbids federal courts from entertaining a suit for monetary damages brought by a citizen against his or her own State. *Pennhurst State Sch. and Hosp. v. Halderrnan*, 465 U.S. 89, 98 (1984); Voisin's *Oyster House, Inc. v. Guidry*, 799 F.2d 183,185-86 (5th Cir.1986).

This doctrine of sovereign immunity founded in the Eleventh Amendment has been recognized, applied and enforced by the United States Supreme Court for over one hundred years.' As such, this district court is bound by the sound doctrine so recognized. Therefore, the Court will address the application of this doctrine to the State defendants.

B. Claims against the State of Louisiana and the DOC

The plaintiffs have named as defendants the State of Louisiana and the DOC. The DOC is a department within the Louisiana state government. La. Rev. Stat. Ann. § 36:401. For Eleventh Amendment purposes, the DOC is considered an arm of the state since any judgment against it or its subdivisions necessarily would be paid from state funds. *Anderson v. Phelps*, 655 F. Supp. 560, 564 (M.D. La. 1985). Therefore, suit against the DOC is suit against the State of Louisiana implicates the Eleventh Amendment immunity doctrine. *Citrano v. Allen Correctional Center, 891* F. Supp. 312, 320 (W.D. La. 1995) ("A suit against any state correctional center would be suit against the state and therefore barred by the Eleventh Amendment.") (citing *Anderson*, 655 F. Supp. at 560 and *Building Engr. Serv. Co., Inc. v. Louisiana*, 459 F. Supp. 180 (E.D. La. 1978)).

The Eleventh Amendment does not allow the states, however, to disregard the Constitution or valid federal law. *Alden v. Maine*, 527 U.S. 706, 754-55 (1999). Thus, two constitutional principles limit state sovereign immunity. *Black v. North Panola School* Dist., 461 F.3d 584 (5th Cir. 2006) (citing *Alden*, at 754-55). First, states are immune from suit per the Eleventh Amendment unless they have given their consent to be sued. Id. Where, on its own initiative, a state enacts a statute that consents to suit, it abandons sovereign immunity. Id. An exception to this also exists under § 5 of the Fourteenth Amendment, which provides that states cannot prohibit individuals from bringing private suits in state court under 42

U.S.C. § 1983. Id. (citing *Alden*, at 756). This exception would not apply in this case which has been brought in federal court.

Second, state sovereign immunity prohibits private suits against States but not against lesser entities. *Alden*, 527 U.S. at 756. Eleventh Amendment immunity does not extend to suits prosecuted against municipalities or other governmental entities that are not considered arms of the state. Id. The issue of immunity is raised here by the State and its agent or agencies. Thus, this condition also does not apply since suit is brought against the State.

Thus, the only means of avoiding the Eleventh Amendment prohibition in this case would be if the state has expressly waived Eleventh Amendment sovereign immunity. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (holding that a state's consent to suit against it in federal court must be expressed unequivocally); *Welch v. Dep't of Highways*, 780 F.2d 1268, 1271-73 (5th Cir. 1986). However, as reiterated in the motion to dismiss, the State of Louisiana has not done so. To the contrary, La. Rev. Stat. Ann. § 13:5106(a) provides that "no suit against the state ... shall be instituted in any court other than a Louisiana state court." The record reflects no indication that the State or the DOC have otherwise expressly waived immunity.

Therefore, the Motion to Dismiss as it applies to the State of Louisiana and the DOC should be granted and the claims against the State of Louisiana and DOC should be dismissed for lack of jurisdiction and for failure to state a claim for which relief can be granted.

C. Claims against Richard Stalder in his Official Capacity

The plaintiffs have also sued Richard Stalder, Secretary of the DOC, in his official capacity. In order to succeed on a claim of a civil rights violation under 42 U.S. C. § 1983, a plaintiff must prove both that the constitutional violation occurred and that it did so because of an action taken by a "person" under color of state law. *FlaggBros., Inc. v. Brooks*, 436 U.S. 149,156 *(1978); Polk County v. Dodson*, 454 U.S. 312 (1981). However, it is a fundamental premise of the Supreme Court that a state actor sued in his official capacity is not considered a person for purposes of suit under § 1983. *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989). Thus, Stalder in his official capacity is not a person suable for a civil rights violation under § 1983.

Instead, the action would be considered one taken against the agency he represents. *See Monell v. Dept. of Social Services*, 436 U.S. 658, 690 n. 55 (1978). In this case, the agency would be the Louisiana Department of Public Safety and Corrections ("DOC"). As discussed above, the DOC is a department within the Louisiana state government and it enjoys Eleventh Amendment immunity. *Anderson v. Phelps*, 655 F. Supp. 560, 564 (M.D. La. 1985). There has been no waiver of this immunity. Therefore, suit against the defendant Stalder, in his official capacity, is suit against the State of Louisiana, which is prohibited by the Eleventh Amendment as resolved above. *Muhammad v. Louisiana, 2000* WL *1568210 (E.D.* La. Oct. *18, 2000).*

For these reasons, Stalder, in his official capacity, is not a "person" for purposes of suit and instead, as an official for the State of Louisiana, enjoys Eleventh Amendment immunity from suit. The defendants' Motion to Dismiss should be granted and the claims against Stalder, in his official capacity only, dismissed for lack of jurisdiction and for failure to state a claim for which relief can be granted.

IV. Rule 12(B)(6) Motion to Dismiss (Rec. Doe. No.19)

The plaintiffs named as a defendant the Orleans Parish Criminal Sheriff's Office. This motion seeks dismissal of that defendant on the basis that a Sheriff's Office is not a legal entity capable of suing or being sued. The plaintiffs have not filed an opposition to this motion.

In accordance with Rule 17(b) of the Federal Rules of Civil Procedure, Louisiana law governs whether the Orleans Parish Criminal Sheriff's Office has the capacity to sue or be sued.' Under Louisiana law, to possess such capacity, an entity must qualify as a "juridical person." This term is defined by the Louisiana Civil Code as ". . . an entity to which the law attributes personality, such as a corporation or partnership." La. Civ. Code Art. 24.

Under Louisiana law, Parish Sheriff's Offices are not legal entities capable of suing or being sued. *Ruggiero v. Litchfield*, 700 F. Supp. 863, 865 (M.D. La. 1988). The State of Louisiana grants no such legal status to any Parish Sheriff's Office. *Liberty Mutual Insurance Co. v. Grant Parish Sheriff's Department*,

350 So.2d 236 (La. App. 3d Cir.), *writ refused*, 352 So.2d 235 (La. *1977)*. Without such a recognized status, the Orleans Parish Criminal Sheriff's Office is not a juridical person capable of being sued.

The defendant's Rule 12(b)(6) Motion to Dismiss should be granted and the claims against the Orleans Parish Criminal Sheriff's Office be dismissed for failure to state a claim for which relief can be granted.

IV. Recommendation

It is therefore RECOMMENDED that the Motion to Dismiss Defendants State of Louisiana; State of Louisiana, through the Department of Public Safety and Corrections; and Secretary Richard Stalder (Rec. Doe. No. 6) be GRANTED and that the plaintiffs' federal and state claims against the State of Louisiana, the Louisiana Department of Public Safety and Corrections, and Secretary Richard Stalder, in his official capacity only, be DISMISSED WITH PREJUDICE for lack of jurisdiction and for failure to state a claim for which relief can be granted.

It is further RECOMMENDED that Rule 12(B)(6) Motion to Dismiss (Rec. Doc. No. 19) be GRANTED and that the plaintiffs' federal and state claims against the Orleans Parish Criminal Sheriff's Office be DISMISSED WITH PREJUDICE for failure to state a claim for which relief can be granted.

A party's failure to file written objections to the proposed findings, conclusions, and recommendation in a magistrate judge's report and

recommendation within ten (10) days after being served with a copy shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court, provided that the party has been served with notice that such consequences will result from a failure to object. *Douglass v. United Services Automobile Ass'n*, 79 F.3d 1415, 1430 (5th Cir. 1996).

Footnotes

[1]Rec. Doc. No. 30.

[2] The plaintiffs have made no effort to certify a class in this instance.

[3]Rec. Doc. No. 1, p.2, Par. 3

[4]The plaintiffs' complaint erroneously references this monumental date as August 28, 2006.

[5]Rec. Doc. No. 1, p.4, Par. 8.

[6]Rec. Doc. No. 1, p.5, Par. 9.

[7]See cases cited hereafter.

[8]Rule 17(b) of the Federal Rules of Civil Procedure provides that "capacity to sue or be sued shall be determined by the law of the state in which the district court is held." See Fed. R. Civ. Proc. 17(b).

126

(2)

No. 08-883

IN THE

Supreme Court of the United States

ROBERT FAIRLEY, PETITIONER

v.

THE STATE OF LOUISIANA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

ROBERT FAIRLEY
pro se

c/o Ashton R. O'Dwyer, Jr.
821 Baronne Street
New Orleans, LA 70113
(504) 679-6166

CURRY & TAYLOR ♦ (202) 393-4141

GROUNDS FOR PETITION FOR REHEARING

Petitioner avers that the grounds for this Petition for Rehearing comply with the provisions of Rule 44(2) of the Supreme Court Rules, because intervening circumstance of a substantial or controlling effect, or to other substantial grounds not previously presented to this Honorable Court, exists, namely:

> The erroneous rulings in the Courts below were "tainted" by judicial misconduct in the Courts below, all as is meticulously set forth in separate Complaint(s) of Judicial Misconduct filed in the United States Court of Appeals for the Fifth Circuit on April 14, 2009 and on April 16, 2009, respectively, attached as Exhibit Nos. 1 and 2.

ARGUMENT

The underlying case being the subject of this Petition for Rehearing is part of the "Victims of KATRINA" litigation which originated in the United States District Court for the Eastern District of Louisiana, with a decision adverse to Petitioner in the District Court being appealed to the United States Court of Appeals for the Fifth Circuit. Petitioner only recently "connected the dots" to identified serious judicial misconduct in both the District Court and the Court of Appeals. See Exhibit Nos. 1 and 2.

In short, the District Court and the Court of Appeals are hopelessly corrupted and polluted, not only by judicial misconduct, which violated Federal Judges' oaths of office and the Canons contained in the "Code of Conduct for United States Judges," but which also

involves violation of multiple sections of Title 18, United States Code. Petitioner respectfully submits that the issues raised in this Petition for Rehearing require the exercise of this Court's supervisory jurisdiction so that the confidence of the public in the independence and integrity of the entire Federal judicial process will be maintained, rather than shaken to its very foundations.

Respectfully submitted,
Robert Fairley
In propria persona
c/o Ashton R. O'Dwyer, Jr.
821 Baronne Street
New Orleans, LA 70113
Tel. (504) 450-9014
Fax. (504) 581-4336
arod@adwyerlaw.com

CERTIFICATION OF PETITIONER

COMES NOW Petitioner herein, and certifies that the foregoing Petition for Rehearing of the Order Denying Petitioner's Petition for Writ of Certiorari complies with Rule (44) of this Honorable Court, and that same is limited to the requirements thereof. Petitioner herein further certifies that this Petition is presented in good faith and not an attempt in delay.

Respectfully submitted,

Robert Fairley

Exhibit 1 US Court of Appeals for the Fifth Circuit, Complaint(s) of Judicial Misconduct filed 4/14/2009

COMPLAINT(S) OF JUDICIAL MISCONDUCT

COMES NOW Ashton R. O'Dwyer, Jr., appearing *in propria persona* pursuant to the provisions of the "Rules Governing Complaints of Judicial Misconduct," who does declare under penalty of perjury, pursuant to the provisions of 28U.S.C. §1746, the truth and correctness of the following:

1. That the following Judges of the United States Court of Appeals for the Fifth Circuit[1] are guilty of judicial misconduct by virtue of the violation of their oath of office, violation of the Canons contained in the "Code of Conduct for United States Judges," as well as conspiracy to commit same:

James L. Dennis in Case Nos. 08-30052, 07-30349, and 08-30362;
Rhesa H. Barksdale in Case No. 08-30052;
Emilio M. Garza in Case No. 08-30052;
Thomas M. Reavely in Case No. 08-30052;
Carolyn Dineen King in Case Nos. 07-30349 and 08-30362; and

[1] Complainant acknowledges the probability that other Federal officials, such as members of the Court's or the Judges' Staff, are also guilty of misconduct; however, no complaint against those officials is being made at this time.

Jennifer Walker Elrod in Case Nos. 07-30349 and 08-30362.

2. The misconduct complained of herein took place during the pendency of the referenced cases at New Orleans, Louisiana, and where the Judges maintain their offices, if elsewhere than New Orleans.

3. The misconduct complained of herein consisted of prohibited *ex parte* communications between and among the Judges identified herein and all or some of the following, which communications were known by the Judges to be prohibited, because they involved the merits of the cases identified herein and how the outcome(s) in those cases could be improvidently influenced by others:

a) One or more members of the Louisiana Supreme Court, including particularly, but without limitation, now Chief Justice Catherine D. Kimball, and/or her surrogates, and/or the surrogates of other members of the Louisiana Supreme Court;

b) One or more employees of the Office of Disciplinary Counsel for the Louisiana Supreme Court, including particularly, but without limitation, Chief Disciplinary Counsel Charles B. Plattsmier, Jr., and/or his surrogates, and/or the surrogates of other employees of the Office of Disciplinary Counsel;

c) Employees of the State of Louisiana, including particularly, but without limitation, employees of the Louisiana Department of Justice and/or State employees within the Executive, Judicial and/or

Legislative Branches of Louisiana State Government, and/or their surrogates;

d) Members of the Plaintiffs' Bar of the State of Louisiana, including particularly, but without limitation, those Members of the Plaintiffs' Bar who represent the interests of plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation pending in the United States District Court for the Eastern District of Louisiana, but who simultaneously represented the interests of the State of Louisiana between August 29, 2007 and October 9, 2008, and/or Members of the Louisiana Bar who signed fee-sharing agreements with such Plaintiffs' Bar members, and/or any of their surrogates;

e) Members of the United States District Court for the Eastern District of Louisiana and/or Members of the Staff of that Court, including particularly, but without limitation, Stanwood R. Duval, Jr. and his spouse and law clerk, Janet Daley Duval, and/or their surrogates; and

f) Other members of the United States Court of Appeals for the Fifth Circuit and/or their surrogates.

4. In support of these complaints of misconduct, and to specifically avoid running afoul of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct, Complainant incorporates herein by reference thereto the following Exhibits, copies of which will be submitted if requested by the Chief Judge:

Exhibit No. 1 – Transcript of Statement given under Penalty of Perjury by Ashton R. O'Dwyer, Jr., to the Louisiana Department of Justice on October 14, 2005;

Exhibit No. 2 – Record Document No. 114 in Civil Action 06-7280, in the Eastern District of Louisiana, being the Complaint in that action;

Exhibit No. 3 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, dated August 20, 2007;

Exhibit No. 4 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, directed to the issue of discovery dated, December 19, 2007;

Exhibit No. 5 – Unsworn Declaration Under Penalty of Perjury made pursuant to 28 U.S.C. §1746 by Complainant's Law Enforcement Expert, David R. Kent, on March 4, 2009;

Exhibit No. 6 – Complainant's Un-refuted Motion to Strike False and Defamatory Allegations in Case No. 08-30052;

Exhibit No. 7 – Judge Dennis' Order of September 22, 2008, summarily denying Exhibit No. 6;

Exhibit No. 8 – Complainant's Motion for Disclosure in Case No. 08-30052;

Exhibit No. 9 – Complainant's E-mail to Deputy Clerk Michael Brown, in Case No. 08-30052, referencing Complainant's Motion for Disclosure by Judge Dennis;

Exhibit No. 10 – The Court's Order of December 18, 2008, summarily denying Exhibit No. 8;

Exhibit No. 11 – Complainant's correspondence in Case No. 08-30052 to the Clerk of the 5th Circuit dated September 24, 2008;

Exhibit No. 12 – Complainant's November 10, 2008 correspondence in Case No. 08-30052 to the Clerk of 5th Circuit; and

Exhibit No. 13 – Complainant's Petition for Panel Rehearing and/or for Rehearing En Banc in Case No. 08-30052, together with attached Exhibits.

Complainant avers that the Chief Judge should not act on the complaints alleged herein without review of the Exhibits identified *supra*, which Complainant is prepared to submit to the Chief Judge, if requested, but which are not attached hereto in order to avoid running afoul of the provisions of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct.

5. Complainant further avers that the Court's decisions in Case Nos. 08-20052, 07-30349 and 08-30362 were the result of judicial misconduct, and at least peripherally related to the following issues in Civil Action No. 06-7280 and 05-4182 (and consolidated cases) pending in the United States District Court for the Eastern District of Louisiana:

1) A criminal gangland-style "hit" which was executed by the Louisiana State Police against Complainant at five minutes past midnight on September 20, 2005, on orders from persons employed

by the Louisiana Department of Justice, by the Louisiana Supreme Court and by the Office of Disciplinary Counsel for the Louisiana Supreme Court;

2) A patently obvious non-consentable, concurrent conflict of interests on the part of certain so-called prominent Members of the Plaintiffs' Bar who simultaneously represented plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation bearing Civil Action No. 05-4182 (and consolidated cases) in the U.S. District Court for the Eastern District of Louisiana, as well as the interests of the State of Louisiana, between August 29, 2007 and October 9, 2008[2];

3) Bias, prejudice and partiality, and other judicial misconduct, warranting the recusal of Stanwood R. Duval, Jr., in the "Victims of KATRINA" litigation[3]; and

4) Claims asserted by Complainant and his clients against the State of Louisiana, its agencies and instrumentalities, political subdivisions, and individual department heads, in the "Victims of KATRINA" litigation.

6. By virtue of their having participated in prohibited *ex parte* communications as described, *supra*, and allowing those communications to influence their decision-making on the merits in the referenced cases, the Judges identified herein each violated the

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[2] This issue is articulately pleaded in Civil Action N0. 08-4728 on the Eastern District docket.

[3] Ibid.

following Canons contained in the Code of Conduct for United States Judges:

Canon 1 - was violated by each of the accused Judges, who made a mockery of the terms "independent," "honorable," "justice," "high standards of conduct," and "integrity," as a result of the misconduct alleged herein.

Canon 2(A) - was violated by each of the accused Judges, because they neither respected nor complied with the law, and because the misconduct alleged herein is the antithesis of acting "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Canon 2(B) - was violated by each of the accused Judges, because they allowed social or other relationships to influence their judicial conduct and judgment, and because they not only conveyed to others the impression that they were in a special position of influence, and did nothing to stop that impression, but then acted in an official capacity to advance the private interests of others.

Canon 3(A)(1) - was violated by each of the accused Judges, because not only did they make a mockery of the terms "faithful" and "professional competence in the law," but they permitted their decision-making to be dictated by partisan interests.

Canon 3(A)(4) - was violated by each of the accused Judges, because they engaged in prohibited *ex parte* communications with others on the merits, and procedures affecting the merits, of proceedings pending before them. Judges Dennis, Barksdale, Garza, and Reavely also violated Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case No. 08-30052. Judges Dennis, King and Elrod also violated

Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case No. 08-30362.
Canon 3(B)(1), (2), and (3) - were violated by each of the accused Judges, because they took no action after learning of misconduct by Brother and/or Sister Judges, Court officials and Staff, lawyers and others.

7. The Complaints of judicial misconduct contained herein are not made for the purpose of seeking review of the erroneous decisions involving Complainant and his clients by the Judicial Council of the Fifth Circuit,[4] but rather to instill public confidence in the integrity and independence of judges, and to ensure that judges comply with their oath of office, the law, and the applicable Code of Conduct.

8. More to the point, Complainant avers that although reasonable minds might conclude that the misconduct alleged herein is peripherally related to merits of the decisions in the referenced cases, Complainant specifically avers that his allegations of misconduct are NOT DIRECTLY RELATED TO the decisions in those cases, but rather to the lack of integrity of the accused Judges and of those who wrongfully influenced them.

9. Complainant avers that the Chief Judge should appoint a Special Committee (or Committees) to investigate these complaints and to make recommendations to the Judicial Council. Notwithstanding, this requested relief, Complainant avers that he has no confidence in the ability of the

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[4] However, Complainant avers that judicial review of the erroneous decisions is absolutely warranted under the facts and circumstances.

Chief Judge of the United States Court of Appeals for the Fifth Circuit, any Special Committee which may be appointed by the Chief Judge, or of the Judicial Council of the Fifth Circuit to competently, fairly and impartially investigate and decide the merits of the complaints of misconduct contained herein. In support of these assertions, Complainant refers to the September 28, 2007 Order of Reprimand and Reasons by the Judicial Council in the matter involving former Judge Samuel B. Kent who, since the referenced Order of Reprimand and Reasons, and more particularly on February 23, 2009, pleaded guilty of one count of obstruction of justice, thus demonstrating the abject incompetency of the judicial misconduct process within the Fifth Circuit. Complainant further avers that any investigation(s) by the Special Committee or Committees should also include the appointment of competent forensic experts to analyze office computers, personal computers and blackberries, as well as telephone records, of the accused Judges and others, in order to "test" their answers to questions under oath with extrinsic electronic and documentary evidence.

10. Complainant declares that the allegations, averments and statements contained herein are true and correct under penalty of perjury pursuant to the provisions of 28 U.S.C. §1746.

Exhibit 2 US Court of Appeals for the Fifth Circuit, Complaint(s) of Judicial Misconduct filed 4/16/09

COMPLAINT(S) OF JUDICIAL MISCONDUCT

COMES NOW Ashton R. O'Dwyer, Jr., appearing *in propria persona* pursuant to the provisions of the "Rules Governing Complaints of Judicial Misconduct," who does declare under penalty of perjury, pursuant to the provisions of 28U.S.C. §1746, the truth and correctness of the following:

1. That the following Judges of the United States Court of Appeals for the Fifth Circuit[5] are guilty of judicial misconduct by virtue of the violation of their oath of office, violation of the Canons contained in the "Code of Conduct for United States Judges," as well as conspiracy to commit same:

James L. Dennis[6] in Case Nos. 06-30840, 06-30841, and 08-30234
Jacques L. Weiner, Jr., in Case No. 08-30234.
W. Eugene Davis in Case Nos. 06-30840 and 06-30841.
Edward C. Prado in Case No. 08-30234.

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[5] Complainant acknowledges the probability that other Federal officials, such as members of the Court's or the Judges' Staff, are also guilty of misconduct; however, no complaint against those officials is being made at this time.

[6] Complaint(s) of Judicial Misconduct against Dennis were filed on April 14, 2009 in three other cases. The "common denominator" in the clear majority of cases in which Judicial Misconduct is complained about is the name "James L. Dennis," which Complainant avers is a statistical impossibility unless Dennis is guilty of the conduct complained of herein beyond all reasonable doubt.

Leslie L. Southwick in Case Nos. 06-30840 and 06-30841.
Will Garwood in Case No. 08-30234.
Ron Clark[7] in Case Nos. 06-30840 and 06-03841.

2. The misconduct complained of herein took place during the pendency of the referenced cases at New Orleans, Louisiana, and where the Judges maintain their offices, if elsewhere than New Orleans.

3. The misconduct complained of herein took place during the pendency of the referenced cases at New Orleans, Louisiana, and where the Judges maintain their offices, if elsewhere than New Orleans.

4. The misconduct complained of herein consisted of prohibited *ex parte* communications between and among the Judges identified herein and all or some of the following, which communications were known by the Judges to be prohibited, because they involved the merits of the cases identified herein and how the outcome(s) in those cases could be improvidently influenced by others:

g) One or more members of the Louisiana Supreme Court, including particularly, but without limitation, now Chief Justice Catherine D. Kimball, and/or her surrogates, and/or the surrogates of other members of the Louisiana Supreme Court;

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[7] District Judge from the Eastern District of Texas, who sat on the United States Court of Appeals for the 5th Circuit by designation.

h) One or more employees of the Office of Disciplinary Counsel for the Louisiana Supreme Court, including particularly, but without limitation, Chief Disciplinary Counsel Charles B. Plattsmier, Jr., and/or his surrogates, and/or the surrogates of other employees of the Office of Disciplinary Counsel;

i) Employees of the State of Louisiana, including particularly, but without limitation, employees of the Louisiana Department of Justice and/or State employees within the Executive, Judicial and/or Legislative Branches of Louisiana State Government, and/or their surrogates;

j) Members of the Plaintiffs' Bar of the State of Louisiana, including particularly, but without limitation, those Members of the Plaintiffs' Bar who represent the interests of plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation pending in the United States District Court for the Eastern District of Louisiana, but who simultaneously represented the interests of the State of Louisiana between August 29, 2007 and October 9, 2008, and/or Members of the Louisiana Bar who signed fee-sharing agreements with such Plaintiffs' Bar members, and/or any of their surrogates;

k) Members of the United States District Court for the Eastern District of Louisiana and/or Members of the Staff of that Court, including particularly, but without limitation, Stanwood R. Duval, Jr. and his spouse and law clerk, Janet Daley Duval, and/or their surrogates; and

l) Other members of the United States Court of Appeals for the Fifth Circuit and/or their surrogates.

5. In support of these complaints of misconduct, and to specifically avoid running afoul of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct, Complainant incorporates herein by reference thereto the following Exhibits, copies of which will be submitted if requested by the Chief Judge:

Exhibit No. 1 – Transcript of Statement given under Penalty of Perjury by Ashton R. O'Dwyer, Jr., to the Louisiana Department of Justice on October 14, 2005;

Exhibit No. 2 – Record Document No. 114 in Civil Action 06-7280, in the Eastern District of Louisiana, being the Complaint in that action;

Exhibit No. 3 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, dated August 20, 2007;

Exhibit No. 4 – Sworn Affidavit of Complainant's Law Enforcement Expert, David R. Kent, directed to the issue of discovery dated, December 19, 2007;

Exhibit No. 5 – Unsworn Declaration Under Penalty of Perjury made pursuant to 28 U.S.C. §1746 by Complainant's Law Enforcement Expert, David R. Kent, on March 4, 2009;

Exhibit No. 6 – Complainant's Un-refuted Motion to Strike False and Defamatory Allegations in Case No. 08-30052;

Exhibit No. 7 – Judge Dennis' Order of September 22, 2008, summarily denying Exhibit No. 6;

Exhibit No. 8 – Complainant's Motion for Disclosure in Case No. 08-30052;

Exhibit No. 9 – Complainant's E-mail to Deputy Clerk Michael Brown, in Case No. 08-30052, referencing Complainant's Motion for Disclosure by Judge Dennis;

Exhibit No. 10 – The Court's Order of December 18, 2008, summarily denying Exhibit No. 8;

Exhibit No. 11 – Complainant's correspondence in Case No. 08-30052 to the Clerk of the 5th Circuit dated September 24, 2008;

Exhibit No. 12 – Complainant's November 10, 2008 correspondence in Case No. 08-30052 to the Clerk of 5th Circuit; and

Exhibit No. 13 – Complainant's Petition for Panel Rehearing and/or for Rehearing En Banc in Case No. 08-30052, together with attached Exhibits.

Complainant avers that the Chief Judge should not act on the complaints alleged herein without review of the Exhibits identified *supra*, which Complainant is prepared to submit to the Chief Judge, if requested, but which are not attached hereto in order to avoid running afoul of the provisions of Rules 2(D) and 3(D) of the Rules Governing Complaints of Judicial Misconduct.

6. Complainant further avers that the Court's decisions in Case Nos. 06-30840, 06-30841, and 08-30234 were the result of judicial misconduct, and at least peripherally related to the following issues in Civil Action No. 06-7280 and 05-4182 (and consolidated cases) pending in the United States District Court for the Eastern District of Louisiana:

1) A criminal gangland-style "hit" which was executed by the Louisiana State Police against Complainant at five minutes past midnight on September 20, 2005, on orders from persons employed by the Louisiana Department of Justice, by the Louisiana Supreme Court and by the Office of Disciplinary Counsel for the Louisiana Supreme Court;

2) A patently obvious non-consentable, concurrent conflict of interests on the part of certain so-called prominent Members of the Plaintiffs' Bar who simultaneously represented plaintiffs, claimants and potential class members in the "Victims of KATRINA" litigation bearing Civil Action No. 05-4182 (and consolidated cases) in the U.S. District Court for the Eastern District of Louisiana, as well as the interests of the State of Louisiana, between August 29, 2007 and October 9, 2008[8];

3) Bias, prejudice and partiality, and other judicial misconduct, warranting the recusal of Stanwood R. Duval, Jr., in the "Victims of KATRINA" litigation[9]; and

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[8] This issue is articulately pleaded in Civil Action N0. 08-4728 on the Eastern District docket.

[9] Ibid.

4) Claims asserted by Complainant and his clients against the State of Louisiana, its agencies and instrumentalities, political subdivisions, and individual department heads, in the "Victims of KATRINA" litigation.

7. By virtue of their having participated in prohibited *ex parte* communications as described, *supra*, and allowing those communications to influence their decision-making on the merits in the referenced cases, the Judges identified herein each violated the following Canons contained in the Code of Conduct for United States Judges:

Canon 1 - was violated by each of the accused Judges, who made a mockery of the terms "independent," "honorable," "justice," "high standards of conduct," and "integrity," as a result of the misconduct alleged herein.
Canon 2(A) - was violated by each of the accused Judges, because they neither respected nor complied with the law, and because the misconduct alleged herein is the antithesis of acting "at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."
Canon 2(B) - was violated by each of the accused Judges, because they allowed social or other relationships to influence their judicial conduct and judgment, and because they not only conveyed to others the impression that they were in a special position of influence, and did nothing to stop that impression, but then acted in an official capacity to advance the private interests of others.
Canon 3(A)(1) - was violated by each of the accused Judges, because not only did they make a mockery of

the terms "faithful" and "professional competence in the law," but they permitted their decision-making to be dictated by partisan interests.

Canon 3(A)(4) - was violated by each of the accused Judges, because they engaged in prohibited *ex parte* communications with others on the merits, and procedures affecting the merits, of proceedings pending before them. Judges Davis, Southwick and Clark also violated Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case Nos. 06-30840 and 06-30841. Judges Weiner, Prado and Southwick also violated Canon 3(A)(4) by conspiring with others to deny Complainant oral argument in Case No. 08-30234.

Canon 3(B)(1), (2), and (3) - were violated by each of the accused Judges, because they took no action after learning of misconduct by Brother and/or Sister Judges, Court officials and Staff, lawyers and others.

8. The Complaints of judicial misconduct contained herein are not made for the purpose of seeking review of the erroneous decisions involving Complainant and his clients by the Judicial Council of the Fifth Circuit,[10] but rather to instill public confidence in the integrity and independence of judges, and to ensure that judges comply with their oath of office, the law, and the applicable Code of Conduct.

9. More to the point, Complainant avers that although reasonable minds might conclude that the misconduct alleged herein is peripherally related to merits of the decisions in the referenced cases, Complainant specifically avers that his allegations of

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[10] However, Complainant avers that judicial review of the erroneous decisions is absolutely warranted under the facts and circumstances.

misconduct are NOT DIRECTLY RELATED TO the decisions in those cases, but rather to the lack of integrity of the accused Judges and of those who wrongfully influenced them.

10. Complainant avers that the Chief Judge should appoint a Special Committee (or Committees) to investigate these complaints and to make recommendations to the Judicial Council. Notwithstanding, this requested relief, Complainant avers that he has no confidence in the ability of the Chief Judge of the United States Court of Appeals for the Fifth Circuit, any Special Committee which may be appointed by the Chief Judge, or of the Judicial Council of the Fifth Circuit to competently, fairly and impartially investigate and decide the merits of the complaints of misconduct contained herein. In support of these assertions, Complainant refers to the September 28, 2007 Order of Reprimand and Reasons by the Judicial Council in the matter involving former Judge Samuel B. Kent who, since the referenced Order of Reprimand and Reasons, and more particularly on February 23, 2009, pleaded guilty of one count of obstruction of justice, thus demonstrating the abject incompetency of the judicial misconduct process within the Fifth Circuit. Complainant further avers that any investigation(s) by the Special Committee or Committees should also include the appointment of competent forensic experts to analyze office computers, personal computers and blackberries, as well as telephone records, of the accused Judges and others, in order to "test" their answers to questions under oath with extrinsic electronic and documentary evidence.

11. Complainant declares that the allegations, averments and statements contained herein are true and correct under penalty of perjury pursuant to the provisions of 28 U.S.C. §1746.